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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JUAN CORCHADO JUARBE, Director,
Bureau of Special Investigations of the
Puerto Rico Department of Justice,

Petitioner,

v.

FRANCISCO APONTE PEREZ, Chairman, Judiciary
Committee of the Puerto Rico Senate, and
HECTOR RIVERA CRUZ, Director, Legislative
Investigation Unit of the Puerto Rico Senate,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PUERTO RICO

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QUESTION PRESENTED

1. Do federal principles of legislative immunity, which the court below applied, prevent the courts from enforcing subpoenas issued by the Executive Branch demanding that legislative officials make available physical and documentary evidence gathered as part of a legislative investigation so that the Executive Branch can investigate and prosecute official misconduct by Executive Branch employees?

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PUERTO RICO

The Director of the Bureau of Special Investigations of the Puerto Rico Department of Justice respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Puerto Rico entered in this case.

OPINIONS BELOW

The opinions of the Superior Court (App. B) and the Supreme Court of Puerto Rico (App. A) are unreported.

JURISDICTION

The Puerto Rico courts concluded that, under the decisions of this Court interpreting the Speech or Debate Clause of the United States Constitution, this suit was barred by legislative immunity. Because the lower courts relied on their interpretation of the federal constitutional standards, this Court has jurisdiction under 28 U.S.C. § 1258(3) to determine the soundness of that interpretation. In any event, under the Puerto Rico Federal Relations Act, 48 U.S.C. §§ 731b *et seq.*, the scope of the legislative immunity under the Puerto Rico Constitution is itself an issue of federal law. For this additional reason, this Court has jurisdiction under Section 1258(3) to review the decision below.

1. This case arises out of the efforts of the Puerto Rico Department of Justice to obtain physical and documentary evidence gathered by a committee of the Senate of Puerto Rico. After the committee refused to produce the evidence in response to subpoenas, the relevant Justice Department official filed suit in the Puerto Rico Superior Court seeking (a) a declaratory judgment that the committee could not properly refuse to comply with the subpoenas and (b) an injunction requiring the production of the subpoenaed material. The Superior Court concluded that the principle of legislative immunity, embodied in Article III, section 14 of the Puerto Rico Constitution, barred the suit. The court relied on this Court's decisions interpreting the Speech or Debate Clause of the United States Constitution as defining the scope of legislative immunity, and it read those decisions to require dismissal of the complaint. (App. 3b-7b) On May 22, 1984, the Puerto Rico Supreme Court affirmed, relying on the lower court's "exhaustive analysis of the applicable Constitutional doctrines." (App. 2a)

This Court has jurisdiction to consider whether the Puerto Rico courts correctly interpreted federal law in determining the scope of legislative immunity under the Puerto Rico Constitution. As the Court only recently reaffirmed, "this Court retains a role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law." *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, P.C.*, ___U.S.___, ___, 81 L.Ed.2d 113, 124 (1984); *see Michigan v. Long*, ___U.S.___, ___, 77 L.Ed.2d 1201, 1214 (1983). Here, the Puerto Rico courts treated the Puerto Rico Constitution as having the same meaning and effect as they concluded the United States Constitution would have in comparable circumstances. Because the courts believed that the federal law on legislative immunity would bar the United States Department of Justice from demanding evidence in the custody of a United States Senate committee, they held that the Puerto Rico Constitution similarly barred the complaint. Because the Puerto Rico courts rested their holding on their analysis of a federal question, this Court has jurisdiction "to consider whether it is correct." *Standard Oil Co. v. Johnson*, 316 U.S. 481, 483 (1942). If this Court concludes that the Puerto Rico courts erred in their application of federal law principles, "it has been this Court's practice to vacate the judgment of the state court and remand the case so that the court may reconsider the state law question free of misapprehensions about the scope of federal law." *Three Affiliated Tribes, etc., supra*, 81 L.Ed.2d at 124; *see also Standard Oil Co. v. Johnson, supra*, 316 U.S. at 485.

2. In addition, the Puerto Rico Constitution exists by virtue of the "compact" embodied in the Puerto Rico Federal Relations Act, 48 U.S.C. §§ 731b *et seq.*, and the approval of that constitution by the Congress and the President of the United States. The federal statute

authorizing the adoption of a Puerto Rico constitution, subject to presidential and congressional approval, places certain restrictions on the nature of the Puerto Rico government. The federal statute requires the maintenance of a tripartite government based on principles of separation of powers. *See generally* the discussion in n.3, *infra.* The issues raised by this controversy involve the structure of the government authorized and then approved by federal law.

As the United States District Court for Puerto Rico has recently held, under these circumstances, a dispute between the branches of the Puerto Rico government about their respective powers and immunities is ultimately a matter of federal law. It is, therefore, the duty of "federal courts [to] guarantee separation of powers between the various branches of local government." *Ana Culpeper v. Hernandez Agosto,* Civil. No. 84-1586 (TR), slip op. at 6 (D.P.R. June 25, 1984). The Puerto Rico Federal Relations Act and the subsequent approval process at the very least "federalize[d]" the scope of Puerto Rico legislative immunity by making its proper application an issue of federal law. *Id.,* slip op. at 8.

3. The Puerto Rico Justice Department also contended, in a timely petition for rehearing in the court below, that under the Puerto Rico Federal Relations Act, Congress has made *federal* principles of separation of powers directly applicable to the allocation the powers and immunities between the branches of the Puerto Rico government. The United States District Court in Puerto Rico has so held in two recent cases (*see* n.3, *infra.*).

4. For these three distinct reasons, therefore, this Court has jurisdiction to review the decision below under Section 1258(3) to determine if the issues of federal law have been properly resolved. On June 14, 1984, and June 27, 1984, the Puerto Rico Supreme Court denied timely

motions for reconsideration (App. C & D), and this petition is being filed within the time permitted under 28 U.S.C. § 2101(c) and Supreme Court Rule 20.4.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 6 of the United States Constitution, Article III, Section 14 of the Puerto Rico Constitution and the Puerto Rico Federal Relations Act, 48 U.S.C. §§ 731b *et seq.*, are set forth in Appendix E, *infra.*

STATEMENT

1. On July 25, 1978, police shot and killed two young men on a remote mountain in Puerto Rico known as Cerro Maravilla. Those men were believed to be terrorists who intended to seize and to blow up a large television relay transmission tower located on the mountaintop. The investigations into the events of that day give rise to the controversy presented by this case.

In the years since the incident at Cerro Maravilla, questions have arisen concerning the conduct of the police at the scene and the conduct of the officials involved in investigating those events. At first, it appeared that the charges of misconduct were baseless, but serious evidence recently has surfaced supporting the need for a full investigation into possible criminal wrongdoing. The developments in the case have attracted much public attention, both in Puerto Rico and in the national press. *See, e.g.,* "Is This The Way It Happened . . .," *Life,* September 1984, at 78-84; "10 From Puerto Rico's Police Indicted in '78 Killing of Suspects," *The New York Times,* Feb. 7, 1984, at A20; "Puerto Rico's 'Watergate,' " *Newsweek,* Dec. 12, 1983, at 50; "Two Cases Pit U.S. District Court Against Puerto Rican System," *The Washington Post,* Sept. 18, 1983, at A9. A federal grand jury has

indicted a number of police officers for violating the civil rights of the suspects and for obstructing the federal investigation into the Cerro Maravilla affair. Allegations have been made implicating the conduct of various other government officials as well.

Two branches of the Puerto Rico government have conducted investigations into the events at Cerro Maravilla and their aftermath. The investigation by the Senate of Puerto Rico began in 1981 and has included hearings televised throughout Puerto Rico. Respondent Francisco Aponte Perez is the Chairman of the Committee conducting the investigation and respondent Hector Rivera Cruz is the staff director of that investigation. The investigators have collected evidence not made public in the committee's hearings, including documents voluntarily provided by executive departments of the Puerto Rico government.

In December 1983, the Bureau of Special Investigations of the Puerto Rico Department of Justice (hereafter "BSI") assumed jurisdiction over the administrative and criminal investigations into the serious charges of misconduct that had been made against the public officials allegedly involved in the incident at Cerro Maravilla and the alleged cover-up that followed. The BSI is empowered by statute to investigate charges of criminal conduct, corruption or abuse of authority by public officials in the course of discharging their official dutires. *See* 3 L.P.R.A. § 138(c).

In an effort to fulfill BSI's mandate and the executive branch's constitutional duty to enforce the criminal laws, the Director of the BSI requested that evidence which the Senate investigation had developed be turned over to BSI. This evidence requested was of three types:

1. Documents and other physical evidence that the executive branch itself had furnished to the committee to aid it in its investigation.

2. Evidence, including statements, obtained from third-party witnesses.

3. Documents and other physical evidence prepared or developed within the committee.

When the chairman and the committee staff ignored informal requests, the BSI Director, exercising his statutory authority, 3 L.P.R.A. § 138(f), issued subpoenas to respondents Aponte and Rivera again asking that they produce all documentary and physical evidence relevant to the criminal investigation into the events at Cerro Maravilla. They refused to comply with the subpoenas, asserting that, under the doctrine of legislative immunity, they did not have to respond to any request to produce evidence needed in a criminal prosecution.

The BSI Director then petitioned the Puerto Rico Superior Court (a) for a declaratory judgment that the doctrine of legislative immunity does not support the refusal, and (b) for an injunction requiring compliance with the subpoena. On a motion to dismiss, the Superior Court held that both officials were entitled to legislative immunity, and the petition was dismissed. In reaching this conclusion, the Superior Court rested principally on its interpretation of this Court's decisions in *United States v. Brewster,* 408 U.S. 501 (1972), *Gravel v. United States,* 408 U.S. 606 (1972), and *Eastland v. United States Servicemen's Fund,* 421 U.S. 491 (1975) (hereafter *"Brewster"*, *"Gravel"*, and *"Eastland"*). Going beyond anything this Court held in those cases, the court concluded that no distinction can be made between a request for personal testimony from a legislative official about his legislative acts and a request for physical evidence in the custody of legislative officers. The court cited a single law review article as its only authority to support this proposition. The court then reasoned that because (1) the Senate committee's investigation itself was within the proper sphere of legislative activity, and (2) the evidence re-

quested was "the product" of the investigation, the Director's "request for us to apply the coercive power of the Court to the contents of the Subpoenas is improper." (App. 10b)

On appeal, the Puerto Rico Supreme Court affirmed, explaining that the Superior Court "based its findings on an exhaustive analysis of the applicable Constitutional doctrines." (App. 2a). Although allowing the BSI to obtain copies of evidence that the committee had elected to make public, the Supreme Court concluded that, with regard "to the evidence that has not been made public, it is not proper that we intervene in an area of recognized parliamentary immunity. Article 3, Sec. 14, Constitution, Commonwealth of Puerto Rico." (App. 5a) [1]

REASONS FOR GRANTING THE WRIT

The court below has misapplied the federal standard of legislative immunity and thereby has upset the proper balance of authority between the branches of government. In conflict with this Court's decisions and those of the federal courts of appeal, the decision below has interpreted federal precedents as creating an absolute barrier to obtaining evidence in the possession of a legislative officer that is crucial to a criminal investigation, merely because the officer acquired the evidence in the course of a legislative investigation. This Court should not leave standing such a misconstruction of the federal principle of separation of powers.

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[1] Some confusion arose in the Puerto Rico Supreme Court as to whether BSI sought all evidence relating to the Cerro Maravilla investigation, or simply the material that had already been made public. As the BSI Director attempted to make clear, and the majority decision seemed to recognize, the BSI does not seek only the materials previously disclosed publicly, but all evidence in the committee's possession, including, of course, the material that the executive branch itself had furnished to the committee.

I

A. The principle of legislative immunity embodied in the Speech or Debate Clause is more limited in scope than the court below concluded.

> "The immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators." *Brewster, supra,* 408 U.S. at 507.

The essence of the protection is that a legislator and "those intimately associated" with him cannot be forced to submit to "the harassment of hostile questioning," *In re Grand Jury Investigation Into Possible Violations of Title 18, United States Code,* 587 F.2d 589, 597 (3d Cir. 1978), concerning matters which are "an integral part of the deliberative and communicative processes by which Members participate in . . . matters which the Constitution places within the jurisdiction of either House." *Gravel, supra,* 408 U.S. at 625; *see also United States v. Johnson,* 383 U.S. 169, 181-82 (1966) (hereafter "*Johnson*").

The Founding Fathers, however, did not erect an impregnable wall between the executive and legislative branches when they fashioned the Speech or Debate Clause. The Clause was lifted almost verbatim from the English Bill of Rights of 1689. *See Johnson, supra,* 383 U.S. at 177-78. That provision, in turn, represented the culmination of the long struggle to prevent the King from punishing members of Parliament for exercising their legislative responsiblities. *See* Reinstein & Silverglate, *Legislative Privilege and the Separation of Powers,* 86 Harv. L. Rev. 1113, 1120-35 (1973); *Johnson, supra,* 383 U.S. at 182. As this Court has recognized, therefore, the

Clause "does not prohibit inquiry into activities that are casually or incidentally related to legislative affairs but not a part of the legislative process itself." *Brewster, supra,* 408 U.S. at 528. Legislative immunity is not a privilege of secrecy but a protection against the use of legislative acts against officials protected by the immunity. As one court has put it, the privilege "is not one of nondisclosure but of nonevidentiary use." *In re Grand Jury Proceedings (Cianfrani),* 563 F.2d 577, 584 (3d Cir. 1977); *accord United States v. Helstoski,* 576 F.2d 511, 523 (3d Cir. 1978), *aff'd,* 442 U.S. 477 (1979). Thus, of fundamental importance here, the Clause does not "immunize Senator or aide from testifying at trials or grand jury proceedings involving third-party crimes where the questions do not require testimony about or impugn a legislative act." *Gravel,* 408 U.S. at 622.[2]

The history and purpose of the Clause demonstrate, therefore, that it does not apply where the executive does not seek to hold a legislator or his aide accountable for legislative conduct. Where, as here, there was no threat of "intimidation by the executive and accountability before a possibly hostile judiciary," *Johnson, supra,* 383 U.S. at 181, the legislator and his aide cannot claim an absolute right to withhold cooperation that every other citizen who possesses relevant evidence would owe in a criminal investigation of third parties. As this Court in *Brewster* explained:

> "Our speech or debate privilege was designed to preserve legislative independence, not supremacy. Our task, therefore, is to apply the Clause in such a way as to insure the independence of the legislature without altering the historic balance

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[2] There is no question but that the courts have full authority to compel a legislator or his aide to obey a subpoena if the request falls outside the sphere of the Speech or Debate Clause. *See, e.g., Doe v. McMillan,* 412 U.S. 306 (1973); *Powell v. McCormack,* 395 U.S. 486 (1969).

of the three co-equal branches of Government." *Brewster, supra,* 408 U.S. at 508.

Legislative immunity must be accommodated with the functioning of the other branches. The critical issue in determining whether legislative immunity prohibits compelling cooperation is whether "relief could be afforded without proof of a legislative act or the motives or purposes underlying such an act." *Gravel, supra,* 408 U.S. at 621; *see also Johnson, supra,* 383 U.S. at 185.

The BSI here is not investigating alleged legislative misconduct, but is simply seeking evidence which happens to be in legislative custody in order to investigate and prosecute official misconduct by employees of the executive branch. The BSI subpoenas do not seek to inquire into any legislative acts or the motivations that lay behind any such acts. Even though the evidence happens to be in the possession of legislative officials, no legislator or legislative aide is threatened with hostile questioning.

This Court has previously recognized and applied the distinction between compelling personally incriminating oral testimony that a person has a privilege not to give and requiring the same person to produce physical evidence such as documents that he has in his possession merely because of his relationship to an organization. *See, e.g., Bellis v. United States,* 417 U.S. 85 (1974); *United States v. White,* 322 U.S. 694 (1944). Similarly here, the legislator's constitutional protection against being held accountable for his legislative acts is not implicated by a request that he furnish evidence in connection with an investigation of wrongdoing by third-parties who are not legislative officers. In addition, just as documents that come into an attorney's hands are not thereby transformed into privileged material, the mere fact that a legislative employee obtains custody of third-party material should

not place the evidence beyond the reach of a duly authorized criminal investigation. *See, e.g., Fisher v. United States,* 425 U.S. 391, 402-04 (1976); *United States v. Omohundro,* 619 F.2d 51, 53 (10th Cir. 1980) (*per curiam); Bouschor v. United States,* 316 F.2d 451, 457 (8th Cir. 1963) (per Blackmun, J.).

It would be anomalous, indeed, to treat evidence that happens to be in the possession of legislative officials as absolutely beyond the reach of compulsory process when this Court has ruled that even the President's own constitutionally based executive privilege would have to yield to the criminal justice system's need for tangible evidence in the President's custody. *United States v. Nixon,* 418 U.S. 683, 707 (1974). Such a disparity in responsibilities is not the law. *See In re Grand Jury Proceedings Into Possible Violations Of Title 18, United States Code, supra,* 587 F.2d at 597 (grand jury subpoena to Clerk of the U.S. House of Representatives for toll telephone records of a Member of Congress held not barred by legislative immunity).

The Puerto Rico courts misunderstood the principles that define the scope of legislative immunity. They made no effort to identify those principles and apply them to the facts of this case. Instead, the trial court merely noted that there had been a proper legislative investigation and that the evidence sought was the product of that investigation. The Puerto Rico Supreme Court embraced this "analysis". It made no difference to the courts below that no questioning would occur, no inquiry into legislative proceedings was being conducted, no impugning of legislative activities was being threatened. It made no difference that the executive branch sought to carry out its own constitutional duties to enforce the laws, not against legislators themselves, but against third parties. The decisions below read into federal law a much broader legislative immunity than actually exists.

B. If some qualified privilege exists that requires a weighing of the respective interests of the legislative and executive branches before the courts enforce an investigative subpoena, *cf. United States v. Nixon, supra,* 418 U.S. at 707, the subpoenas here should have passed scrutiny.

The BSI Director is seeking, in part, documents that had originated in the executive branch of government. Far from undermining the legislative process, the enforcement of this request would facilitate legislative investigations, since it is unlikely that the executive officials would cooperate so willingly in future legislative inquiries if they lack the power to retrieve documents when they are needed to discharge the legal and constitutional duties of the executive branch.

Nor would turning over to law enforcement authorities evidence originating with third parties interfere significantly with a legislature's deliberative process. It is unlikely that the legislature's ability to obtain cooperation from third parties would be significantly diminshed if it must later cooperate with the executive branch; the legislature's own subpoena power remains an effective investigatory tool. *See* 2 L.P.R.A. §§ 153-154a (providing for criminal penalties and civil enforcement of Puerto Rico legislative subpoenas).

Finally, although documents created by the committee and its staff present the most difficult category, they too should be subject to production for the purpose of facilitating a major criminal investigation, at least in the face of only a generalized claim to privilege. *See United States v. Nixon, supra.* The legislators and their staff must support a claim of privilege with a particularized showing of the bases and need for such protection. *See Benford v. American Broadcasting Cos.,* 98 F.R.D. 42, 45 (D. Md. 1983) (subpoena enforced against Clerk of House of Representatives for legislative documents sought in private civil suit), *rev'd on other grounds,* 733 F.2d 634 (4th Cir. 1984).

The Puerto Rico courts made no such careful inquiry and analysis. Instead, they concluded that legislators and their employees have an absolute constitutional right to refuse all cooperation with a criminal investigation. The doctrine of legislative immunity, however, is part of, and is properly analyzed by reference to, the principle of separation of powers. *See Johnson, supra,* 383 U.S. at 178; Brewster, *supra,* 408 U.S. at 508. A correct understanding of the doctrine of separation of powers establishes the dividing line between (a) the power of the executive branch to compel cooperation of legislators and their aides with a duly authorized criminal investigation and (b) the sanctuary wherein legislators and their aides are beyond the reach of executive authority. A practical rather than mechanical application of "separation of powers" requires a more careful analysis of the interests to be protected than the Puerto Rico courts applied in this case. This Court should correct the misapplication of federal law by the courts below and reaffirm the balance of power between the executive and legislative branches in their discharge of their respective responsibilities.[3]

II

This case concerns one of the fundamental issues of United States constitutional law: the proper allocation of

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[3] The Puerto Rico courts here sought to apply federal principles governing legislative immunity and separation of powers without explaining why they were doing so. In fact, as the federal district court for the District of Puerto Rico has explicitly held, the Puerto Rico Federal Relations Act, 48 U.S.C. §§ 731b *et seq.*, and the subsequent process by which the Congress and the President approved the Puerto Rico Constitution, mean that when the "implication of the separation of powers doctrine embodied" in that Act is at issue in a case, it "federalize[s] this controversy" and federal principles of law must be applied. *Ana Culpeper v. Hernandez Agosto, supra,* slip op. at 8; *see also Martinez Acosta v. Hernandez Agosto,* Civil No. 84-1441 (JP) (D.P.R. June 21, 1984) (applying standards of Speech or Debate Clause of United States Constitution to determine whether Puerto Rico legislators are immune from suit).

(footnote continues)

power between the branches of the government. The need to strike a balance between autonomy and responsibility, between independence and supremacy, between defiance and cooperation is a crucial task for this Court, in its effort to preserve the equality of the institutions exercising governmental authority.

The Puerto Rico courts did not heed this Court's warning that "these exceptions to the demand for every man's evidence are not lightly created nor expansively construed." *United States v. Nixon, supra,* 418 U.S. at 710; *accord Webster v. Sun Co.,* 731 F.2d 1, 4 (D.C. Cir. 1984) ("grants of absolute immunity ought to be interpreted narrowly to serve only the purposes justifying the immunity"). The decision below threatens to upset the balance by expanding the legislator's immunity far beyond the requirements of separation of powers or of this Court's previous decisions. The executive branch of the Puerto Rico government needs these materials to pursue a critically important investigation of possible criminal wrongdoing by government officials. The decision below seriously impedes that investigation and threatens the executive's ability to pursue its investigation successfully.

(footnote continued)

The Compact with Puerto Rico requires Puerto Rico to maintain a "republican form of government," the hallmark of which is the separation of powers among coordinate branches of government. *See, e.g., Buckley v. Valeo,* 424 U.S. 1, 119 (1976); *United States v. Nixon, supra,* 418 U.S. at 705-14; *Duncan v. McCall,* 139 U.S. 449, 461 (1891); *Minor v. Happersett,* 88 U.S. (21 Wall.) 162, 175-76 (1875); *see also The Federalist* No. 9, at 72; No. 47, at 301; No. 51, at 321; No. 66, at 401 (New American Library Ed. 1961). The Puerto Rico Constitution in fact adopted the same separation of powers that is embodied in the United States Constitution, and it was approved by the National Government because, *inter alia,* it adopted the same tripartite system. *See* House Rep. No. 1832, 82nd Cong., 2d Sess. (1952), *reprinted in* 1952 U.S. Code Cong. & Ad. News 1892, 1898, 1900, 1902. Under these circumstances, federal law requires that Puerto Rico (and similarly established "commonwealths") must adhere to federal principles of separation of powers. *See Springer v. Government of the Philippine Islands,* 277 U.S. 189 (1928); *Camacho v. Civil Service Commission,* 666 F.2d 1257 (9th Cir. 1982) (Commonwealth of the Northern Marianas).

Legislative officials have been permitted to withhold physical and documentary evidence for no reason other than the personal status of the custodians of the evidence. Average citizens cannot but question their own responsibility to aid the criminal justice system when legislators and their functionaries can so easily deny the investigators access to crucial evidence.

The court below denigrated the importance of criminal investigations in a way that conflicts with attempts by this Court and other courts to strike a proper balance between the criminal process and other governmental processes. *See, e.g., In re Grand Jury Investigation into Possible Violations of Title 18, United States Code, supra* (legislative immunity does not permit blanket refusal to produce congressional telephone records to grand jury); *In re Grand Jury Proceedings (Cianfrani), supra* (executive's interest in pursuing investigation of mail fraud and tax evasion outweighed legislator's interest in confidentiality of payroll records); *cf. In re Grand Jury Subpoena, May, 1978 at Baltimore,* 596 F.2d 630 (4th Cir. 1979) (*per curiam*) ("interest in broad disclosure of evidence to a grand jury" outweighed state's concern for secrecy of tax records); *In the Matter of the Special April 1977 Grand Jury,* 581 F.2d 589 (7th Cir.) (*per curiam*), *cert. denied,* 439 U.S. 1046 (1978) (grand jury's interest in hearing all relevant evidence outweighed whatever remote likelihood that "worthwhile conduct" would be deterred by production of campaign records, employee rosters, travel records and telephone bills by state official).

Since the court below interpreted this Court's precedents as effectively giving members of the United States Congress the power to frustrate a federal criminal investigation, it is especially appropriate for this Court to restore the proper constitutional balance.

CONCLUSION

Certiorari should be granted.

Respectfully submitted.

NELSON MARTINEZ ACOSTA
Secretary of Justice
San Juan, Puerto Rico

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September 1984.

APPENDIX A

OPINION OF THE PUERTO RICO SUPREME COURT

Unofficial Translation

IN THE SUPREME COURT OF PUERTO RICO

No. 0-84-266

JUAN CORCHADO JUARBE, *et al.*
Petitioner-Appellant

v.

HON. FRANCISCO APONTE PÉREZ, PRESIDENT OF THE JUDICIARY COMMISSION, SENATE OF P.R., *et al.*
Defendant-Appellee

APPEAL PROCEEDING FROM THE SUPERIOR COURT, SAN JUAN PART, HON. ABNER LIMARDO, Judge

---

Declaratory Judgment, Injunction, etc.

RESOLUTION

In San Juan, Puerto Rico, this 22nd day of May, 1984.

I.

Juan Corchado Juarbe, Director of the Bureau of Special Investigations of the Department of Justice of the Commonwealth of Puerto Rico (BSI), appeals the dismissal decreed on March 16, 1984, by the Superior Court, San Juan Part, of his petition for a declaratory judgment

that defendants Francisco Aponte Pérez, President of the Judiciary Commission of the Senate of Puerto Rico, and Héctor Rivera Cruz, Director of the Senate's Legislative Investigation Unit, may not refuse to produce as it was required of them by subpoena "all evidence given to the Judiciary Commission related with the happenings occurring on July 25, 1978, on Cerro Maravilla", including "sworn statements of all the agents of the public order that in any way participated in said happenings, documentary and demonstrative evidence and any transcripts, minutes or records that may be relevant to this matter; as well as any other documentation or declaration related to these facts."

The appealed court based its findings on an exhaustive analysis of the applicable Constitutional doctrines.

In his appeal, Corchado Juarbe alleges the following errors:

> "A. The request to the defendants-appellees to submit to the petitioner-appellant the evidence given publicly by the Judiciary Commission of the Senate of Puerto Rico as part of its investigation on the happenings of July 25, 1978 on Cerro Maravilla does not constitute an undue interference by the Executive Branch in the actitvities of the Legislative Branch protected by the doctrine of parliamentary immunity expressed in Section 14 of Article 3 of the Constitution of the Commonwealth of Puerto Rico.
>
> B. The petitioner appellant BSI has the power and the obligation to request the documents in controversy so that it may comply with the ministerial duties that the law imposes upon it and the Judiciary Commission of the Senate must surrender the same to the appellant.

C. The controversy in this case is justiciable and does not constitute a matter that may be classified as a political question; therefore ordering the production of the requested evidence does not run against the principle of separation of power on which rests our Constitutional order."

This being the case, on May 4th, defendants-appellees Aponte Pérez and Rivera Cruz requested that the appeal be dismissed on the grounds that Corchado Juarbe for the first time limited his request to the evidence made public by the Judiciary Commission, which scope was different to that of the subpoena originally served which before required "all evidence given to the Judiciary Commission." They also expressed the following:

"The position assumed by the petitioner-appellant is frivolous because he is requesting a remedy from the wrong parties. If it is true as it is expressed in his brief, that all that the appellant wishes to obtain is the evidence that was made public, all that he has to do is request a copy of the documents filed in the Senate Secretary's Office. In said documents, appear all the evidence that was made public before the Judiciary Commission.

The defendants-appellants are neither the custodians nor the persons authorized to surrender copies of said documentation since this is the exclusive function of the Secretary of the Senate. Nor do they have any objections that a copy of said documents be surrendered to appellant after following the corresponding procedure if in fact, as it is alleged, all that is requested is the evidence that has been made public."

Subsequently, petitioner-appellant Corchado Juarbe, in his Opposition to the Motion to Dismiss, indicated before the Court below and during the reconsideration

requested that he had previously clarified "the scope of his request."

He reiterated his petition by pointing out that "the Executive Branch has the ministerial duty of presenting those criminal charges that are proper after the happenings on Cerro Maravilla to the courts." Furthermore, in his Motion Supplementing his Opposition to the Motion to Dismiss filed May 10, 1984, he stated:

> "It is clear that petitioner has a right to obtain all the evidence that is in possession of the Senate Judiciary Commission, the petitioner-appellant has always requested all the evidence in possession of Senate Judiciary Commission as it appears from the petition and the letter dated January 10, 1984, signed by the petitioner, which reads in part.
>
> > 'To those effects, we respectfully request from that Honorable Commission its cooperation in order to obtain all the evidence given said Commission which is pertinent to our investigation. That includes sworn statements given by the agents of the public order, documentary and demonstrative evidence, and any transcripts, minutes or records that are relevant to this matter.' Appellants' Brief, page 5.
>
> The defendants-appellees have acquiesced to the production of that part of the evidence which has been made public by the Judiciary Commission as it more fully appears from its Motion to Dismiss filed before this Honorable Court on May 4, 1984. Therefore, there is no controversy about the same. Nevertheless, it is unquestionable that the District Attorney's Office would be in an infinitely better position to fully

carry out its ministerial duties of filing the charges that are proper before the courts and successfully prosecuting those persons who have committed crime in this case if they could count on all the evidence which includes not only the sworn statements and other documentary evidence, but also real and demonstrative evidence, we reiterate or prayer to this Honorable Court to order the Judiciary Commission of the Senate to surrender to the petitioner-appellant all evidence that is in its possession and is the product of the Senatorial investigation is has conducted." (Emphasis supplied.)

II

The briefs and arguments of the parties before this Court dispel any doubt on the scope of the request. In respect to the evidence that has not been made public, it is not proper that we intervene in an area of recognized parliamentary immunity. Article 3, Sec. 14, Constitution, Commonwealth of Puerto Rico. In regard to the evidence given publicly to the Senate Judiciary Commission, the Superior Court's judgment is not an obstacle to obtaining the evidence directly through the administrative process. There is no controversy as to this matter.

In light of the above, this case is dismissed.

So ordered by the Court and certified by the General Secretary. Associate Justice Mr. Rebollo López concurs in the result because he understands that the appeal has become academic after appellant limited his request to the evidence made public by the Judiciary Commission of the Senate of Puerto Rico.

Lady Alfonso de Cumpiano
Secretary

APPENDIX B

OPINION OF THE PUERTO RICO SUPERIOR COURT

Unofficial Translation

IN THE SUPERIOR COURT OF PUERTO RICO

SAN JUAN SECTION

CIVIL NO. 84-619(902)

JUAN CORCHADO JUARBE, Director of the Bureau of Special Investigations of the Department of Justice of the Commonwealth of Puerto Rico,
Plaintiff

vs.

HON. FRANCISCO APONTE PEREZ, President, Senate Judiciary Commission, Senate of Puerto Rico, and HECTOR RIVERA CRUZ, ESQ. Director, Legislative Investigation Unit of the Senate of Puerto Rico, etc.
Defendants.

DECLARATORY JUDGMENT AND INJUNCTION

JUDGMENT

Juan Corchado Juarbe, Director of the Bureau of Special Investigations of the Department of Justice of Puerto Rico ("BSI") requests a Declaratory Judgment in which he asks us to decide that Defendants Francisco Aponte Pérez, President of the Senate Judiciary Commission, and Héctor Rivera Cruz, Director of the Legislative Investigation Unit of the Puerto Rico Senate, may not refuse to produce the information he has required of them by subpoenas dated 19 and 25 of January, 1984, to wit:

"all evidence given to the Judiciary Commission related with the happenings of July 25, 1978 on Cerro Maravilla including sworn statements of all the agents that in any way participated in said happenings, documentary and demonstrative evidence and any transcriptions, minutes on proclamations that may be relevant to this matter; as well as any other documentation or statements related to these facts."

The petitioner alleges and proves by the documents accompanying the petition that during December of 1983 and under the authority of Law No. 38 of July 7, 1978, the "BSI" acquired jurisdiction in the criminal and adminstrative investigation related to the conduct of the public officials that participated in the Cerro Maravilla happenings; that after ignoring and later refusing to produce the evidence that was required through the subpoenas, the Defendants were summoned to appear before him, bringing with them said evidence under the penalty of contempt in accordance with Law No. 3 of March 18, 1954.

Further, he alleges that the documents requested from the Defendants "must be produced because they are public documents which have been requested for legitimate purposes in the aforementioned investigation." He adds that his purpose "is not that the Defendants appear to testify, but that they produce the public documents that were requested;" that their conduct in refusing to produce the documents "is one contrary to the public policy of the Commonwealth of Puerto Rico and is at odds with justice;" he cites from the case of *Peña Clos, infra,* that "neither the legislative bodies or their appendices nor the officials of the Executive Branch may become the judges of their own powers." Finally, he prays that we order the Defendants to turn over to him the requested documents.

The Defendants filed a Motion to Dismiss on March 1984, and, pursuant to rule No. 8.4(a) of the Rules of Civil Procedure, the case was submitted.

We decide that the request made to the Defendants that is informed in the Petition, constitutes an undo interference by the Executive Branch with the activities of the Legislative Branch, which is protected by the Doctrine of Parliamentary Immunity contained in Section 14 of Article No. 3 of the Constitution of the Commonwealth of Puerto Rico. The Defendants, as Senator and Officer, respectively, of the Senate of Puerto Rico, are protected by said immunity and the Petitioner is barred from requesting the expressed information.

Section 14 of Article 3 of the Constitution, establishes legislative immunity as follows: "Every member of the legislative Assembly shall enjoy parliamentary immunity for his votes and expressions in either of the Chambers or in any of its Commissions." The theoretical basis for this protection is found in the Doctrine of Separation of Powers to bar attempts by one branch of the government to usurp, intervene or in any other way obstruct the carrying out of the duties of another branch of government. Tribe, *American Constitutional Law,* 1978, p. 291, 294-95. It constitutes a mechanism for the preservation of the independence and, therefore, the integrity of the legislative process. André Bauriou, *Derecho Constitucional e Instituciones Políticas,* Ediciones Ariel 1971, p. 236-37; Reinstein and Silverglate, *Legislative Privilege and the Separation of Powers,* 86 Harv. L. Rev. 1113. It is of substantive nature and operates for the benefit of the independence of every legislator or legislative official in relation to the activities carried out within their legislative functions. *U.S. vs. Brewster,* 408 US 501, 33 L. Ed. 2d 507, 92 S Ct. 2531; *Gravel vs. U.S.,* 408 US 606, 33 L. Ed. 2d 583, 92 S Ct. 2614; *Eastland vs. United States Servicemen's Fund,* 421 US 491, 44 L. Ed. 2d 324, 95 S Ct. 1831.

And once the legislative character of the activity which is the subject of the intervention by another branch of government is demonstrated, the immunity confers protection of an absolute character and it is not subject to question in any other proceedings. Tribe, *supra,* p. 292-93.

The expressed legal principles have been the object of ample judicial recognition both in the local as well as the federal spheres. The historical development and the judicial and political justification of the legislative immunity clause was eloquently expressed in *In Re Rodríguez Torres,* 106 DPR 698, 705-720, that reaffirmed said doctrine as "a precious bastion of the integrity and independence of the legislative process" that "the courts have resisted to significantly narrow its reach and much less invade it." (p. 707). In the United States Constitution the parliamentary immuniy clause appears at the end of Section 6 of Article No. 1, as follows: "... and for any speech or debate in either House, they (members of Congress) shall not be questioned in any other place." It has been interpreted amply to meet its purpose of preserving the independence and intergrity of the legislative process. The cases of *Brewster, Gravel* and *Eastland* are significant decisions of the Supreme Court of the United States in relation to the legislative immunity clause. The different pronouncements in these cases concern us, to wit: *Brewster* decides that the parliamentary immunity clause reaches every activity that clearly forms part of the legislative process; it forbids that a legislator be questioned or render an account for his legislative actions or his motivations in relation to the same. (408 US 512-516, 33 L Ed. 2d 518, 519, 520). It concluded the legislative immunity clause must be viewed as sufficiently ample to insure its purpose of maintaining the traditional independence granted to the legislative bodies and sufficiently narrow to prevent excesses of those who attempt to

erode the autonomy that is generated by the parliamentary process through the usurpation of the legislative powers. (408 US 516, 33 L Ed. 2d 520). It added that the clause was designed for both the personal benefit of the legislator as well as to protect the integrity of the legislative body through the preservation of the independence of individual legislators. (408 US 507, 33 L Ed. 2d 515).

In *Gravel,* the Court recognizes that the protection constitutes a policy in itself addressed to procure the effective functioning of government by maintaining the autonomy of its three branches; it rejected the intimidation of the Executive in the legislative process as an element that threatens the balance of powers. (408 US 616 33 L Ed. 2d 597). It explains the even though the actions of the legislators in legislative committees are subject to review in the varied circumstances that comprise the judicial review of the legislation itself, their actions carried out within the framework of the legislative sphere cannot be the basis of criminal or civil actions. (408 US 624 33 L Ed. 2d 603). Although it concluded that the heart or nerve of the immunity is that which is verbally expressed in the deliberative process, it discarded a literal interpretation of the clause so that it may extend also to reports, resolutions and in general, to all things that are produced in the legislative sessions; and to everything that is an integral part of the process for which the legislators take part in commissions and those for the consideration, approval or rejection of legislative measures or related to matters within the jurisdictional spheres which the Constitution confers on the Chambers. (408 US 625, 33 L Ed. 2d 602). It added that the privilege granted by the immunity clause protects, in addition to the legislator, legislative personnel in their actions within the legislative spheres; it recognized that the modern legislative process cannot be conceived without the intervention of persons

that assist as counselors in the legislative task and for parlimentary prerogatives they are treated as legislators; as their alter egos. (408 US 616, 617, 624 33 L Ed. 2d 597).

Eastland points out that as a fundamental function of the parliamentary expressions immunity clause, is the prevention of Executive intimidation over the legislators and the possible accounting of these before a hostile judiciary. (421 US 502 44 L Ed. 2d 336). It establishes that the same protects not only against the consequences of a litigation but also of the burden that is imposed on the legislator and the energy and time it requires for him to defend it. (421 US 503 44 L Ed. 2d 313). It reiterates that once the legislative and legitimate character of the actions over which the Executive intends to intervene is demonstrated, that is they are within the legitimate legislative spheres, they are protected by parliamentary immunity of an absolute character. Thus, always whenever there is an attempt to question or inquire into a legitimate legislative activity, the protection of said immunity will come into operation to prevent the members of legislative assemblies or their personnel from being questioned or interrogated in any forum about their legislative activities or motivations in relation to the same. (421 US 491, 501, 503, 525, 44 L Ed. 2d 336-338). It was expressed additionally, in this case, that the power to approve legislation inherently includes the power of investigation and the compiling of information respecting the conditions over which the legislation is interested in affecting; without which the parliamentary body could not efficiently and intelligently legislate.

Like *Gravel,* the *Eastland* decision extended the protection of parliamentary immunity to legislators and those officers that assist them in the legislative commissions since they are considered alter egos of the former. (421 US 507, 510 44 L Ed. 2d 339, 341). It advised of the

limited authority of the Courts to inquire into the motivations of legislative actions of legislators that act within the Constitutional framework that comprises the wide sphere of their legitimate functions and that the wisdom of the legislative focus on matters are not opened to judicial veto. (421 US 506, 509 44 L Ed. 2d 338, 341). In relation to the nature of the investigatory powers through legislative commissions and the narrow margin of judicial power to penetrate into the motivations of legislative actions carried out within the sphere of the constitutional mandate conferred on the chambers by the legislative power, see in addition to *Eastland, Banco Popular, Liquidador vs. Corte,* 63 DPR 66, 79-80, and *Peña Clos vs. Cartagena,* 83 JTS 83 (1983) at pages 3302 and 3303.

Colón Berrios vs. Hernández Agosto, 716 F 2d. 85, 90, 91 (1983) from the First Circuit, decided that the senatorial investigation is an essential ingredient of the legislative process. It sustain the absolute character of the immunity of legislators against judicial actions when they are acting within the sphere of their legislative functions. Acknowledging the liberal interpretation criteria that is required by the legislative immunity clause, it is inmaterial that the request made to the legislator or legislative officer be made for the production of his oral testimony, documents or other evidentiary material that is in his possession. If the request represents questioning or inquiring over the legislative activities, the parliamentary immunity will operate in relation to his personal appearance as well as to the production of documents or the required evidentiary material. *D. Kaye,* Congressional Papers, Judicial Subpoena and the Constitution, 24 UCLA L. Rev. 523. In this respect, this author expresses, at page 551.

> "[I]n terms of the clause's wording and policy, there is no reason to distinguish between a subpoena for a personal testimony and one for

> documentary evidence. Both forms of discovery may threaten freedom of speech or debate in demanding out-of-chambers explanations of purely legislative activities. Consequently, subpoenas duces tecum, like subpoenas ad testificandum, have been held to constitute 'questioning' within the meaning of the speech or debate clause."

We are obliged to dispense urgent disposition to this case in light of its nature. *Eastland,* supra, p. 511 n. 17. The legitimacy of the investigation that is being carried on by the Senate through its Judiciary Commission in relation to the occurrences on Cerro Maravilla on 25 July 1978, is unquestionable. We take judicial notice of Senate Resolution No. 91, dated 23 February 1981, that orders said Commission to carry out "an investigation on everything that occurred on Cerro Maravilla on the 25th of July, 1978, in relation to the deaths of Carlos Soto Arriví and Arnaldo Darío Rosado" and "once terminated . . . submit to the consideration of the Senate, the legislation that it recommends as a result of the factual determinations and knowledge acquired during the investigation", *Peña Clos,* supra, p. 3299. In that case, as well as in *Colón Berríos,* supra, page 87, *In Re San Juan Star Company,* 662 F 2d. 108 (1st Cir. 1981) and others heard in this Court, they have acted in full knowledge of the legitimate character of said investigation. Independently, the petition does not question it and so, it will enjoy a presumption of legitimacy. *U.S. vs. Rumely,* 345 US 41 97 L Ed. 2d 770. Likewise, the information required from the Defendants is the product of their work in said investigation carried out within the legitimate area of their functions as President of the Judiciary Commission and Director of the Senate Legislative Investigations Unit. It contains their legislative actions protected by the described interpretation of this concept within the parliamentary immunity clause of Section 14, Article 3 of the Puerto Rico Constitution. On

the other hand, we conclude that Petitioner's request to Defendants that is contained in the Subpoenas dated 19 and 25 January, 1984, represents an inquiry or questioning of their actions in that investigation as the immunity concept has been expressed. Under these circumstances, they are protected by this immunity and the Petitioner is absolutely barred from requiring their appearance or producing the information contained in said subpoenas.

What we now decide in not incompatible with the expression contained in *Peña Clos* that "neither the legislative bodies or their branches nor Executive officers can become judges of their own powers." The same is linked in that case with that other notion that the reach of the legislature's right to information through its power of investigation, although ample, is not absolute. Its relation to the case before us refers to the legal authority within which the Senate Judiciary Commission conducts the investigation on Cerro Maravilla; that is to say, the legitimacy of this legislative activity. But we have already indicated that once the legitimate and legislative character of the questioned activity has been demonstrated parliamentary immunity operates in an absolute mode. The Petition does not allege that the referred investigation constitutes an arbitrary use of the investigative power of the Senate without a legislative purpose or that it is contrary to citizen's prerogatives contained in the Bill of Rights, that is, outside of a constitutional framework. Therefore, in light of the remedy we have given, it is unnecessary that we make an analysis of the interests that was necessary in *Peña Clos.* In light of the effect we have given in this case to the parliamentary immunity clause, we have also found unnecessary to make the selective and separate examination that the Court raised in *Peña Clos* if the method to weigh values now substitutes or not the traditional manner in every kind of clash between the infomation required by Legislative and Executive Branches.

By virtue of the above, we reiterate that Petitioners request for us to apply the coercive power of the Court to the contents of the Subpoenas is improper. Granting the Petition would represent approving a direct intervention with the integrity and independence of the legislative process and would make the Judiciary Commission as an investigative body that assists the Senate in those proceedings, a fragile and vulnerable organism. If it were granted, it would, with all probability, irreparably stop the investigation on the happenings on Cerro Maravilla assigned to said Commission and the purposes of the assignment. We are dealing with an impermissible intervention to the balance of the separation of powers that is backed by the public policy that is obtained through the Doctrine of Parliamentary Immunity which would be converted into a mere rhetorical instrument of little value.

In view of the above, the Petition is dismissed.

In San Juan, Puerto Rico, March 16, 1984.

Abner Limardo
Judge

APPENDIX C

DENIAL OF THE FIRST MOTION FOR RECONSIDERATION

Unofficial Translation

IN THE SUPREME COURT OF PUERTO RICO

No. 0-84-266

JUAN CORCHADO JUARBE, ETC.,
Appellant,

VS.

HON. FRANCISCO APONTE PEREZ, ETC.
Appellee.

Declaratory Judgment and Injunction

ORDER

SAN JUAN, PUERTO RICO, JUNE 14, 1984

The motion for reconsideration is denied.

As agreed by the Court and certified by Madam General Secretary.

Lady Alfonso-Cumpiano
Secretary General

APPENDIX D

DENIAL OF THE SECOND MOTION FOR RECONSIDERATION

Unofficial Translation

IN THE SUPREME COURT OF PUERTO RICO

No. 0-84-266

APPEAL FROM THE SUPERIOR COURT, SAN JUAN SECTION

JUAN CORCHADO JUARBE, ETC.,
Appellant

VS.

HON. FRANCISCO APONTE PEŕEZ, ETC.,
Appellee

Declaratory Judgment and Injunction

ORDER

SAN JUAN, PUERTO RICO, JUNE 27, 1984

To the motion for reconsideration denied. Follow what has been decided.

As agreed by the Court and certified by Madam Secretary.

Lady Alfonso-Cumpiano
Secretary

APPENDIX E

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 6 of the United States Constitution provides, in part:

> "The Senators and Representatives shall . . . be privileged from Arrest during their attendance at the session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place."

Article III, Section 14 of the Puerto Rico Constitution provides:

> "No member of the Legislative Assembly shall be arrested while the house of which he is a member is in session, or during the fifteen days before or after such session, except for treason, felony or breach of the peace. The members of the Legislative Assembly shall not be questioned in any other place for any speech, debate or vote in either house or in any committee."

The Puerto Rico Federal Relations Act, 48 U.S.C. § 731b *et seq.*, provides, in relevant part:

> "Fully recognizing the principle of government by consent, sections 731b-731e of this title are now adopted in the nature of a compact so that the people of Puerto Rico may organize a government pursuant to a constitution of their own adoption." 48 U.S.C. § 731b.
>
> "Sections 731b-731e of this title shall be submitted to the qualified voters of Puerto Rico for acceptance or rejection through an island-wide referendum to be held in accordance with

the laws of Puerto Rico. Upon the approval of said sections, by a majority of the voters participating in such referendum, the Legislature of Puerto Rico is authorized to call a constitutional convention to draft a constitution for the said island of Puerto Rico. The said constitution shall provide a republican form of government and shall include a bill of rights." 48 U.S.C. § 371c.

"Upon adoption of the constitution by the people of Puerto Rico, the President of the United States is authorized to transmit such constitution to the Congress of the United States if he finds that such constitution conforms with the applicable provisions of sections 731b-731e of this title and of the Constitution of the United States.

"Upon approval by the Congress the constitution shall become effective in accordance with its terms." 48 U.S.C. § 731d.

Office-Supreme Court, U.S.
FILED
OCT 12 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-373

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JUAN CORCHADO JUARBE, Director,
Bureau of Special Investigations of the
Puerto Rico Department of Justice,

Petitioner,

v.

FRANCISCO APONTE PEREZ, Chairman, Judiciary
Committee of the Puerto Rico Senate, and
HECTOR RIVERA CRUZ, Director, Legislative
Investigation Unit of the Puerto Rico Senate,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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October 12, 1984

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39p

QUESTION PRESENTED

1. Do federal principles of legislative immunity, which the court below applied, prevent the courts from enforcing subpoenas issued by the Executive Branch demanding that legislative officials make available physical and documentary evidence gathered as part of a legislative investigation so that the Executive Branch can investigate and prosecute official misconduct by Executive Branch employees?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-373

JUAN CORCHADO JUARBE, Director,
Bureau of Special Investigations of the
Puerto Rico Department of Justice,
Petitioner,

v.

FRANCISCO APONTE PEREZ, Chairman, Judiciary
Committee of the Puerto Rico Senate, and
HECTOR RIVERA CRUZ, Director, Legislative
Investigation Unit of the Puerto Rico Senate,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondents respectfully request this Court to dismiss the petition for a writ of certiorari for lack of jurisdiction or, in the alternative, to deny the writ in the exercise of its discretionary jurisdiction.

JURISDICTION

Petitioner predicates this Court's jurisdiction on 28 U.S.C. Sec. 1258(3). He alleges two separate grounds for his jurisdictional assertion:

1. That in interpreting Art. III, Sec. 14 of the Puerto Rico Constitution, which creates legislative immunity

for the Legislative Assembly of Puerto Rico, the Puerto Rico courts relied on their understanding of federal constitutional law under the Speech or Debate Clause of the United States Constitution. Art. I. Sec. 6.

2. That, in any event, the scope of legislative immunity for Puerto Rican legislators is itself a question of federal law arising under the Puerto Rican Federal Relations Act. 48 U.S.C. secs. 732 *et seq.* (hereafter "PRFRA").

As will be discussed more fully below, it is respondents' contention that this Court lacks jurisdiction over the petition for certiorari since petitioner's jurisdictional claims are frivolous and since the only issues presented are solely issues of Puerto Rican constitutional law.

STATEMENT OF THE CASE

The petition for a writ of certiorari is the latest salvo in a prolonged legal battle between the Executive and Legislative Branches of Puerto Rico, stemming from the assassination by Puerto Rican police on July 25, 1978 of two young advocates of independence for Puerto Rico. The events occurred on a remote mountain in rural Puerto Rico, Cerro Maravilla, where the deceased were led by an undercover agent of the Puerto Rico police, presumably, to commit acts of terrorism, although they were woefully ill-equipped for the task.[1] At the precise moment when these events occurred, the Governor of Puerto Rico was delivering a forceful pro-statehood speech at the official celebration of Commonwealth Day.

The Governor promptly labeled the policemen present at Cerro Maravilla "heroes" and two quick, successive

[1] These "men believed to be terrorists who intended to seize and to blow up a large television relay tower located on the mountaintop" (Pet. 5), had in their possession a pair of gloves, two handguns, a ski mask, a package of solid charcoal starter and a box of matches. See the press articles cited on page 5 of the Petition.

"probes" by the Puerto Rico Department of Justice absolved them of all responsibility and held that they acted in self-defense. Two equally incomplete investigations by the United States Department of Justice reached the same results.

Unconvinced by the results of these probes and alarmed by their unprofessionalism and by the egregious contradictions in the testimonies of ocular witnesses, the Puerto Rico Senate decided to launch its own investigation of the matter and entrusted it to its Judiciary Committee, chaired by respondent Aponte Pérez. The Committee promptly hired an experienced investigator, respondent Rivera Cruz, who for more than a year labored quietly but tenaciously, interviewing witnesses, gathering evidence and reviewing the reports of the four previous local and federal probes. Thereafter, respondent Rivera Cruz proceeded to present the results of his investigation to the Committee, via televised hearings. For a judicial recognition of the impact of these hearings on the Puerto Rico public opinion, see *Colón Berríos* v. *Hernández Agosto*, 716 F. 2d 85, 86 (1st Cir. (1983).

The Senate investigation completely destroyed the conclusions of the four official probes. Relying on the testimony of ocular witnesses whom the previous local and federal investigators had slighted or disbelieved, of expert witnesses and of three policemen who participated in the Cerro Maravilla stake-out and testified under immunity, the Senate proved to all who wanted to see and hear that the policemen in Cerro Maravilla apprehended the young men, beat them up and executed them by firing squad while the victims knelt, handcuffed.[2]

The investigation, moveover, showed conclusively that there had been a cover-up at the local level and raised the

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[2] Thus, the four national press articles cited by petitioner on page 5 of his petition, never would have been written but for the Senate investigation.

distinct possibility of cooperation by federal personnel in the cover-up. At present, the Committee is exploring the extent of the cover-up, following leads wherever they may lead.

The Senate investigation was so successful and unimpeachable that the federal government launched a third investigation which culminated in criminal indictments against ten policemen who were active participants in the Cerro Maravilla operation.

The success of the Senate investigation came about despite entrenched, obstinate and stubborn opposition and obstruction from all corners of the Executive Branch, from the Governor down. The Senate was forced to go to Court on countless occasions to gain access to pertinent documentary evidence and to force witnesses to testify. It was also taken to court, both federal and local, by witnesses, by members of the Executive Branch and even by the minority Senators of the Judiciary Committee, who are members of the Governor's party.[3]

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[3] What follows is a list of all cases, of both descriptions. The salient point is that the Senate ultimately emerged victorious in *all* of them. *Soto* v. *Romero Barceló, Hernández Agosto, intervenor,* no. 79-236 (D.P.R., March 16, 1981), *rev'd sub nom. In Re San Juan Star Company,* 662 F.2d 108 (1st Cir. 1981); *Hernández Agosto* v. *Cartagena (Cartagena I),* PE-81-1101 (P.R. Super, June 29, 1982); *Peña Clos* v. *Cartagena (Cartagena II),* PE 82-425 (P.R. Super; March 18, 1983), *rev'd,* 83 JTS 83 (P.R. S.Ct., Oct. 3, 1983); *Hernández Agosto* v. *Cartagena (Cartagena III),* PE 83-229 (P.R. Super., Oct. 14, 1983); *Colón Berrios* v. *Hernández Agosto,* No. 83-1493 (D.P.R., Jul[illegible], 1983), *rev'd,* 716 F.2d 85 (1st Cir. 1983); *Santiago* v. *Hernández Agosto,* PE-83-875 (P.R. Super., Sept. 7, 1983); *Hernández Agosto* v. *González Pérez,* PE-83-1338 (P.R. Super., Oct. 11, 1983); *Pérez Casillas* v. *Hernández Agosto,* PE-83-1361 (P.R. Super., Oct. 18, 1983), *Hernández Agosto* v. *Montañez,* PE-83-1379, (P.R. Super., Oct. 20, 1983); *Reverón Martínez* v. *Hernández Agosto,* PE-83-1272 (P.R. Super., Oct. 25, 1983); *Hernández Agosto* v. *Méndez Rivera,* PE-83-1316 (P.R. Super., Oct. 31, 1983); *Hernández Agosto* v. *Reverón Martínez,* PE-84-317 (P.R. Super., March 12, 1984); *Marrero Bonilla* v. *Comisión Estatal de Elecciones,* Civil No. 84-1060 (P.R. Super.,

These are the facts which gave rise to the instant suit. After six long years, during which he persisted in calling the Maravilla policemen heroes, made all sorts of attempts to undermine and derail the Senate investigation, steadfastly refused to name a special independent prosecutor to conduct a true, impartial criminal investigation of the Maravilla events, and pressed for the resignation of two Secretaries of Justice who felt otherwise, Governor Romero, on December 8, 1983, ordered petitioner, his subordinate, to take exclusive jurisdiction of all administrative and criminal investigations of the Cerro Maravilla events.

It is in this context that the petitioner's demand for "all evidence given to the Judiciary Commission related with the happenings of July 25, 1978 on Cerro Maravilla . . . , as well as any other documentation or statements related to these facts" (Pet. 2b), was evaluated and denied by the Puerto Rico courts under the Puerto Rico Constitution's legislative immunity clause.

Contrary to the assertion on Pet. 8 n.1, it was never at all clear whether petitioner demanded access only to the evidence which the Committee has already made public or whether he also demanded the evidence in the possession of respondent Rivera Cruz, with which he is still working, and

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March 16, 1984), *cert. denied*, 0-84-191 (S. Ct. P.R., March 19, 1984); *Romero Barceló* v. *Hernández Agosto*, PE-84-357 (P.R. Super., March 23, 1984), *rev'd*, 84 J.T.S. 35 (S. Ct. P.R., May 1, 1984); *Santiago* v. *Hernández Agosto*, Civil No. 84-460 (P.R. Super., May 29, 1984); *Hernández Agosto* v. *Martínez Acosta*, PE-84-657 (P.R. Super., June 6, 1984); *Hernández Agosto* v. *Colton Fontán*, PE-84-656 (P.R. Super., May 22, 1984); *Hernández Agosto* v. *Betancourt*, PE-84-986 (P.R. Super., July 19, 1984); *Hernández Agosto* v. *Rivera Rodríguez*, PE-84-1110 (P.R. Super., August 10, 1984); *Hernández Agosto* v. *Romero Barceló*, PE-84-1128 (P.R. Super.), *removed* to Federal District Court, Civil no. 84-2186 (D.P.R. pending), consolidated with *Romero Barceló* v. *Hernández Agosto*, Civil No. 84-2186 (D.P.R.).

which has yet to be made public by the Committee.[4] The petition, literally read, seemed to demand access to both and the trial court so understood it. Yet, in his motion for rehearing before the trial court, petitioner repeatedly stated that he only demanded access to "those documents which are in the possession of said Legislative Commission, and which have been made public by it, related to the Cerro Maravilla case." Motion for Rehearing, Superior Court of Puerto Rico, Civil No. 84-619 (902), March 27, 1984, p. 1, par. 3. See also pp. 7, 11 and 15. Worse still, he framed his first question on appeal to the Puerto Rico Supreme Court in those very terms ("evidence publicly divulged by the Commission") (Brief on Appeal, p. 4) and persistently used language to that effect in his April 17, 1984 Brief on Appeal. See pp. 2, 4, 5, 8, 15, 22, 25 and 29. In his "Opposition to Motion to Dismiss the Appeal" of May 10, 1984, p. 2-3, petitioner again reiterated that he only sought access to "that evidence divulged in the public hearings held by the Judiciary Committee and to that evidence originally received in executive session and later made public." He went as far as to state that this had been his posture at all stages of the suit. *Id.*

It was through his motion of May 11, 1984 that petitioner informed the Supreme Court of Puerto Rico otherwise. On page 2 of said motion, he stated:

> "The right of petitioner-appellant to obtain *all* evidence in the possession of the Senate Judiciary Com-

[4] As a matter of fact, a substantial part of such evidence has not been presented yet *to the Committee itself*, following the strict secrecy rules approved by the Committee for carrying on the investigation. At this late stage of the suit, it is evident that the petitioner is *most* interested in this evidence. His reasons are quite obvious. That evidence deals not with the assassination, but with its cover-up by the Executive Branch of the Commonwealth government. To file and prosecute murder charges, petitioner has more than enough evidence produced and made public by the Senate investigation and to which he has access under the judgment of the Supreme Court of Puerto Rico. (Pet. 5a)

> mittee is clear. Petitioner-appellant always has asked for all evidence in the possession of the Committee . . .''[5]

It was on this confused record, full of equivocal statements by herein petitioner as to the remedy sought, that the Supreme Court of Puerto Rico held that petitioner had a right of access to evidence publicly divulged by the Commission, but that the legislative immunity clause of the Puerto Rico Constitution prevented his access to evidence not yet made public. (Pet. 5a).

Petitioner timely moved twice for reconsideration of the Supreme Court judgment, on June 1 and June 18, 1984. Both motions were denied on June 14 and June 27, 1984, respectively. (Pet. 1c, 1d). It was only on the second motion for reconsideration, of June 18, 1984, that petitioner first attempted to raise an alleged federal question, to wit, that Public Law 600 of July 3, 1950, 64 Stat. 314, 48 U.S.C., Secs. 731b-731e (hereafter ''P.L. 600'') required that the Constitution which Puerto Rico was thereby enabled to draft ''provide a republican form of government.'' 48 U.S.C., Sec. 731c. From this it follows, it was claimed, that all issues of separation of powers which arise under the Puerto Rico Constitution of 1952 really arise under federal law. This ''federal question'' first raised before the Supreme Court of Puerto Rico in a second motion for reconsideration, after judgment, is renewed before this court.

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[5] In their May 11, 1984 Motion, attorneys for petitioner claimed that the text of that motion originally formed part of the seven-paragraph May 10, 1984 motion, as its eighth paragraph, but that somehow it had been dropped inadvertently. Whoever compares both motions, structurally as well as analytically, will have much more than a lingering doubt as to the accuracy of the claim of inadvertent omission. The motions are simply contradictory. This of course, presents an ethical question of the exclusive competence of the Supreme Court of Puerto Rico. It must be pointed out that counsel of record for petitioner before this Court played no role in the litigation before the Puerto Rico courts.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THIS COURT LACKS JURISDICTION OVER THE PETITION

A. The Question Tendered in the Petition Under Public Law 600 Was Not Properly and Timely Presented to the Supreme Court of Puerto Rico

The Supreme Court of Puerto Rico rendered its judgment on May 22, 1984 (Pet. 1a). Prior to that judgment, no federal question had been raised in the trial court or in the Puerto Rico Supreme Court. An attempt to raise a federal question was not made until the second motion for reconsideration filed by petitioner before the Puerto Rico Supreme Court on June 18, 1984, as petitioner himself admits before this Court. (Pet. 4, par. 3). It was denied without opinion on June 27, 1984. (Pet. 1d). It is renewed here as one of two "distinct reasons [why] this Court has jurisdiction to review the decision below under Section 1258(3) . . ." (Pet. 4).

The jurisdictional provision relied on in the petition, 28 U.S.C., Sec. 1258(3), grants jurisdiction to review final judgments of the Supreme Court of Puerto Rico by writ of certiorari ". . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under, the United States." The jurisdiction so conferred upon this Court is identical to its jurisdiction to review the final judgments or decrees of state courts under 28 U.S.C., Sec. 1257(3).[6] As under Sec. 1257(3), the "specially set up

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[6] Section 1258 of the Judicial Code is copied almost verbatim from the provisions in Section 1257. It was adopted ". . . in view of the change of the status of Puerto Rico from that of a territory to that of an associated Commonwealth under the Act of Compact" and for the purpose of providing for ". . . review [of] final judgments or decrees of the Supreme Court of Puerto Rico on certiorari or appeal in the same manner as judgments from the highest courts of the several States of the Union are now reviewed by [the Supreme] Court." Sen. Rep. No. 735, 87th Cong., 1st

or claimed" provision in Sec. 1258(3) requires that the federal question be timely and properly presented to the Commonwealth Supreme Court. If the question is not so raised and the Supreme Court of Puerto Rico declines to consider it, this Court is without jurisdiction to review the judgment on writ of certiorari. See *Cardinale* v. *Louisiana*, 394 U.S. 437, 438-39 (1969).

Ordinarily, the proper and timely presentation requirement is not satisfied when, as here, the federal questions were raised for the first time after judgment by the Supreme Court of Puerto Rico, upon a motion for reconsideration or petition for rehearing, and that Court did not entertain nor decide the federal questions so advanced. See *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 128 (1945); *Herndon* v. *Georgia*, 295 U.S. 441, 443 (1935); and *Forbes* v. *State Council of Virginia*, 216 U.S. 396, 399 (1910).[7]

Sess., August 14, 1961. This Court's Rule 54 provides that "[t]he term 'state court' when used in the Rules of this Court, normally includes . . . the Supreme Court of the Commonwealth of Puerto Rico (See 28 U.S.C., Secs. 1257, 1258), and references in these Rules to the law and statutes of a State normally include the law and statutes . . . of the Commonwealth of Puerto Rico."

[7] As stated by this Court, if the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party can affirmatively show the contrary. See *Street* v. *New York*, 394 U.S. 576, 582 (1969). In the present case the Puerto Rico Supreme Court's denial of petitioner's motion for reconsideration, without deciding the federal questions raised therein, was based undoubtedly upon its established practice not to consider or decide questions raised for the first time in a motion for reconsideration addressed to a judgment previously rendered. See *Blanco* v. *Hernández*, 18 P.R.R. 699 (1912); *Oronoz* v. *Montalvo*, 20 P.R.R. 256 (1914); *Saurí* v. *Saurí*, 39 P.R.R. 810, 813 (1929); *Vázquez* v. *Martinó*, 46 P.R.R. 297, 298 (1934); *Ramos* v. *Sucesión Serrallés*, 51 P.R.R. 350, 351 (1937); and *Boerman* v. *Herederos de Boerman*, 53 P.R.R. 211, 213 (1938). The Court has gone further. For a long time it has refused to consider on appeal questions—constitutional or statutory—which were not presented to the trial court. See, *e.g.*, *P.R. Housing Au-*

Petitioner makes no attempt to justify his belated assertion of the alleged federal question. Obviously, he cannot claim that the federal question was born of a "surprise" decision of the Puerto Rico Supreme Court. Cf. *Saunders* v. *Shaw*, 244 U.S. 317, 320 (1917); *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 677-78 (1930). It is also obvious that the federal law under which the alleged federal question arises is not a new development. Petitioner's alleged federal question arises under a statute dating from 1950, which has not been the subject of any amendments by Congress. Thus, there was no reason, and petitioner does not attempt to provide one, why the alleged federal claim could not have been raised at the trial court level.

The party seeking review must carry the burden of proving that the federal questions raised in the petition for certiorari were timely and properly presented to the courts below. Rule 21.1(h). See, *e.g.*, *Street* v. *New York*, 394 U.S. 576, 582 (1969). Petitioner has made no such affirmative showing. Indeed, the opposite has been clearly demonstrated. The alleged federal question under P.L. 600 was not raised at the proper juncture in the Commonwealth courts. This Court lacks jurisdiction over such question.

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thority v. *Sagastivelza*, 71 P.R.R. 406, 409 (1950); *Commonwealth* v. *Aguayo*, 80 P.R.R. 534, 576 (1958), quoting approvingly from *Ashwander* v. *T.V.A.*, 297 U.S. 288, 346 (1935) (Brandeis, J); *Heirs of Escalera* v. *Barreto*, 81 P.R.R. 580, 589 (1959); *Zalduondo* v. *Iturregui*, 83 P.R.R. 1, 12 (1961); *Heirs of Castillo* v. *Descartes*, 83 P.R.R. 94, 104-05 (1961); *People* v. *Torres*, 86 P.R.R. 239, 242-43 (1962); *Murcelo* v. *H. I. Hettinger & Co.*, 92 P.R.R. 398, 412 (1965); *People* v. *Torres*, 98 P.R.R. 5, 8 (1969); *Galarza Soto* v. *E.L.A.*, 109 D.P.R. 179, 180-81 n.1 (1979). Only in exceptional, unusual cases, has the Court ruled otherwise in order to prevent a miscarriage of justice. See, *e.g.*, *Pueblo* v. *Santiago*, 106 D.P.R. 1, 4 (1977); *Abintestato Marini Pabón*, 107 D.P.R. 433, 439-40 (1978).

B. Even if it Had Been Timely Presented, this Court Would Lack Jurisdiction Over the Public Law 600 Question Since it is a Non-Justiciable Political Question and it Presents No Federal Question.

Petitioner lays great emphasis on the phrase contained in section 2 of P.L. 600, requiring that the Constitution for Puerto Rico provide for a republican form of government. 64 Stat. 314, 48 U.S.C., sec. 731c.[8] From such language, petitioner infers that the term "republican form of government" comprises the doctrine of separation of powers, and that these concepts were somehow violated by the Puerto Rico courts. All this artful pleading is evidently designed to federalize the purely local controversy between the Executive and Legislative branches of the Commonwealth government and to lead this Court to believe that it has a federal question before it. The problem with petitioner's argument is that it ignores both history and applicable case law.

1. The Public Law 600 Claim Presents a Non-Justiciable Political Question.

We have searched in vain the legislative history of P.L. 600 to find the purpose or intent of Congress regarding the meaning of section 2. Given this dearth of guidance in the legislative history, one may fairly conclude that Congress intended that phrase to have the same meaning as the Guaranty Clause of Art. IV, sec. 4 of the Constitution, which guarantees to every State of the Union a Republican Form of Government.

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[8] Petitioner erroneously refers to 48 U.S.C., Sec. 731b *et seq.*, as the Puerto Rico Federal Relations Act. (Pet. 2) In fact, the term Puerto Rican Federal Relations Act refers only to those sections of the Organic Act of 1917 which remained in effect after the approval of P. L. 600. See P.L. 600, Sec. 4; see also H. Rep., No. 2275, 81st Cong., 2d Sess., as quoted in H. Rep. No. 1832, 82d Cong., 2d Sess., 1952 U.S. Code Cong. & Ad. News at 1894. Petitioner's alleged federal question, therefore, would arise under P. L. 600, not under PRFRA.

Except for a brief period during Reconstruction, the authority contained within the confines of that clause has been largely unexplored. See, W. Wiecek, *The Guarantee Clause of the U.S. Constitution* (1972). Nonetheless, existing case law interpreting the Guaranty Clause does not support petitioner's contentions. Quite the contrary is true.

In *Luther* v. *Borden*, 7 How. (48 U.S.) 1 (1849), this Court established the doctrine that questions concerning the guarantee of a republican form of government are political, not judicial, in character and that "it rests with Congress to decide what government is the established one in a State . . . as well as its republican character." 7 How. at 42.

The very few cases where the Court has gone beyond the justiciability issue are of no aid to petitioner. For instance, in *Minor* v. *Happersett*, 21 Wall (88 U.S.) 162 (1875), this Court stated, at 175:

> "The guaranty is of a republican form of government. *No particular government is designated as republican, neither is the exact form to be guarantied, in any manner especially designated.* Here, as in other parts of the instrument, we are compelled to resort elsewhere to ascertain what was intended.
>
> The guaranty necessarily implies a duty on the part of the States themselves to provide such a government. All the States had governments when the Constitution was adopted. In all, *the people participated to some extent, through their representatives elected in the manner specially provided.* These governments the Constitution did not change. They were accepted precisely as they were, and it is, therefore, to be presumed that they were such as it was the duty of the State to provide. Thus we have unmistakable evidence of what was republican in form, within the meaning of that term as employed in the Constitution." (Emphasis added).

Later on, in *Duncan* v. *McCall*, 139 U.S. 449, 461 (1891), this Court stated what it considered to be the essence of the concept:

> By the constitution, a republican form of government is guarantied to every state in the Union, and *the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves.* (Emphasis added).

Finally, in *Forsyth* v. *Hammond*, 166 U.S. 507 (1897), this Court held that a republican form of government does not require, contrary to petitioner's contention, the establishment of a strict system of separation of powers, and that legislative powers could be delegated.

Since *Forsyth*, this Court has remained firm in its view that the concept of a republican form of government presents a non-justiciable political question and has emptied the clause of any judicially cognizable meaning. The most recent holding in this respect is *Baker* v. *Carr*, 369 U.S. 186 (1962), where this Court clearly held that questions regarding the concept are non-justiciable because their resolution has been committed to Congress. See especially 369 U.S. at 223.

The lesson to be learned from this review of the principal cases on the subject is clear. The "republican form of government" concept is associated with the right of the people to freely elect the officers of their own government; that is to say, it is identified with the principle of government by consent of the governed. See generally, J.J. Rousseau, *The Social Contract* 39 (W. Kendall Trans. 1959). The only two Supreme Court cases dealing substantially with the concept so hold, as pointed out above. And one of them, *Duncan* v. *McCall*, calls it "the distinguishing feature of that form". 139 U.S. at 416.

We have been unable to find any case holding that the separation of powers among the coordinate branches of government is an inherent or even an important part of a government republican in form. The cases which have some-

times been cited for such a proposition do not even mention the words "republican form of government." Cf. *Buckley* v. *Valeo*, 424 U.S. 1, 119 (1976); *United States* v. *Nixon*, 418 U.S. 683, 705-714 (1974).

Indeed, federal cases may be found holding that states are not required to abide by the doctrine of separation of powers. See, e.g., *Parcell* v. *Kansas*, 468 F. Supp. 1274, 1277 (D. Kan. 1979); *aff'd sub nom. Parcell* v. *Governmental Ethics Com'n*, 639 F. 2d 628 (10th Cir. 1980).

The second clear lesson that one must gather from the cases examined is that the meaning of the phrase is for Congress to decide. Even those authors who have offered new and revolutionary theories of the Guaranty Clause accept this fact. See *e.g.*, Note, *The Rule of Law and the States: A New Interpretation of the Guarantee Clause*, 93 Yale L.J. 561, 562 (1984).

2. The P.L. 600 Claim Does Not Present a Federal Question

Given the history and meaning of the Guaranty Clause, it would be mistaken to conclude, as petitioner urges upon this Court, that Congress intended to radically change the doctrine established by the decisions of this Court when it included the language of the Guaranty Clause in P.L. 600. Several facts contradict such an argument. First, it is clear from the legislative history that both the President and Congress approved the Constitution of Puerto Rico after finding that it duly conformed with all of the requirements of P.L. 600 and that it provided for a republican form of government. Public Law 447, Joint Resolution Approving the Constitution of Puerto Rico, 66 Stat. 327 (1952). See in particular the 4th and 5th "whereas". See also, 1952 U.S. Code Cong. and Ad. News, at 1892-1902. In short, the body which according to the decisions of this Court is the only arbiter of Guaranty Clause issues has sanctioned the Constitution of Puerto Rico. It is too late in the day for peti-

tioner to challenge such sanction, let alone to do so before this Court.

Second, the issues in this case turn upon the proper interpretation of the Constitution originally approved by Congress. Such document has not been amended or revised in any way pertinent to this controversy. Hence, the condition established in P.L. 447 to the effect that any future amendment to the Constitution would have to be consistent, *inter alia*, with P.L. 600, is irrelevant to the resolution of the present case.

Two cases have been brandished before this Court to support the contention that the requirement of a "republican form of government" in P.L. 600 is a justiciable federal question and presents a separation of powers issue: *Springer* v. *Government of the Philippine Islands*, 277 U.S. 189 (1928), and *Camacho* v. *Civil Service Commission*, 666 F. 2d 1257 (9th Cir. 1982). (Pet. 14-15, n.3). We respectfully submit that both cases are clearly inapposite.

Springer is a controversy regarding the powers granted to the legislative and executive branches of the Philippine Islands government under the Organic Act of 1916, 39 Stat. 545, which at that time constituted the fundamental law of the Philippines and was to all effects and purposes its Constitution. 277 U.S. at 200. In short, in *Springer* this Court was required to interpret the federal statute which at the time established the whole structure of the Philippine government in all its details.

At no time does *Springer* even mention the concept of a republican form of government, nor does it link such a concept with separation of powers principles. In fact, all that *Springer* stands for is the proposition that under the doctrine of separation of powers, *as embodied in the Organic Act*, the legislative branch may not exercise executive authority by retaining the power to appoint those who will execute its laws. See *Buckley* v. *Valeo*, 424 U.S. 1, 119 (1976). That a justiciable issue arising under a statute

enacted by Congress is a federal question is plain. It also plainly does not support petitioner's contention.

The *Camacho* case is also distinguishable in several respects. First, it involved the appellate jurisdiction of the Court of Appeals for the Ninth Circuit over courts sitting in the Northern Mariana Islands (hereafter "NMI") and its role as interpreter of a local law dealing, as in *Springer*, with the appointment by the legislature of some executive officials. In view of the specific language of the Congressional statute, the Court of Appeals held that it had appellate jurisdiction. 666 F. 2d at 1259-1262. It should be stressed that *Camacho* presented no justiciability issues and that federal law clearly authorized federal courts to decide issues of local law.

But more importantly, the other issue involved in *Camacho* was *not* whether the government of the NMI was republican in form, *nor* whether such form of government required separation of powers, but rather whether, unlike the States, it was bound by the federal doctrine of separation of powers because of the explicit requirements of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States. 48 U.S.C. sec. 1681 note.

The Court of Appeals found that the explicit language of the covenant created "a republican government of separate powers". 666 F. 2d at 1263. In this respect it is significant to note that section 203(a) of the Covenant contains a crucial requirement which clearly differentiates it from those contained in P.L. 600. It reads:

> "The Constitution will provide for a republican form of government *with separate executive, legislative and judicial branches*, and will contain a bill of rights." 48 U.S.C., sec. 1681 note. (Emphasis added).[9]

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[9] Moreover, in this very section Congress went on to specify the nature and structure of the separate branches to be established. Such specifications are absent from P.L. 600.

It is obvious that the italicized language is absent from P.L. 600. Likewise as obvious is that Congress must have understood that in order to require three separate branches in the NMI government it had to include specific language to that effect. Thus, the NMI Covenant proves two things. First, that for Congress the terms "republican form of government and "tripartite separation of powers" are not synonymous, nor does the former comprise the latter. Second, that when Congress used the former term in P.L. 600 it did not mean to require Puerto Rico to adopt the federal system of three separate branches. That decision was alone for Puerto Rico to make. The fact that Puerto Rico did adopt the federal model does not make any Puerto Rican separation of powers issue a federal question. Puerto Rico, just like the States, is free to follow whatever course it deems proper in the interpretation of the concept of separation of powers, unhampered by federal strictures.

Therefore, given the crucial difference in language between the Covenant and P.L. 600, one can hardly argue that *Camacho* stands for the proposition that a republican form of government inherently includes a concept of separation of powers or any particular interpretation of that concept.

The present case is totally different from both *Springer* and *Camacho*. Since 1952 Puerto Rico is no longer governed by an Organic Act imposed by Congress. Rather, it is governed under a Constitution adopted by the people of Puerto Rico to organize their government as part of a federal plan geared to provide for Puerto Rico's ever increasing self-government.[10] In fact, and quite pertinent to this case, the sections of the Organic Act of 1917 which P.L. 600 repealed were "the provisions of the act concerned

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[10] For a thorough review of this process, see Lacovara, *The Authority of the Commonwealth of Puerto Rico under the United States Constitution to Join International Organizations and to Enter into International Agreements*, 11 Rev. Jur. U.I.A. 449, 456-469 (1977).

primarily *with the organization of* the local executive, legislative, and judicial branches of the government of Puerto Rico and *other matters of purely local concern.*" H. Rep. No. 2275, 81st Cong. 2d Sess., as quoted in H. Rep. No. 1832, 82d Cong. 2d Sess., 1952 U.S. Code Cong. & Admin. News at 1894 (Emphasis added).[11]

Thus, it is clear that *Springer* dealt with an interpretation of the sections of an organic act which in the case of the Philippine Islands, corresponded precisely with those similar sections of the former Puerto Rico Organic Act which Congress specifically repealed in 1952, because they were matters of purely local concern best dealt with by Puerto Rico itself. And the *Camacho* case dealt with a quite differently worded covenant.

Given these facts, it is patently erroneous to argue that the requirement of P.L. 600 that the Constitution of Puerto Rico provide for a republican form of government, whatever its true meaning, was intended to allow a federal Court to consider it a basis for a justiciable controversy and do a *Springer*-like interpretation of such matters of purely local concern as the organization, powers, and relationship of the legislative and executive branches under the Constitution of Puerto Rico. If that were the case, the phrase would serve to bring through the back door what Congress repealed through the front door. Intellectual dishonesty should not be imputed so lightly to Congress. See *Figueroa v. People of Puerto Rico*, 232 F. 2d 615, 620 (1st Cir. 1956).

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[11] See also S. Rep. No. 1720, 82 Cong., 2d Sess. 6-7 (1952), quoted approvingly in Lacovara, *supra* note 10, at 465. Law review author Lacovara states:

> "There is . . . no way to answer categorically the elusive question of precisely how to characterize the constitutional status of the Commonwealth of Puerto Rico. The single conclusion about which one can be certain is that the Commonwealth's status under the 1950-1952 Compact is *sui generis*, with many aspects of plenary autonomy in its domestics affairs similar to the authority of States, while it is also subject to the direct legislative jurisdiction of Congress, except to the extent congressional enactments are, in the vague words of the PRFRA, 'locally inapplicable'." *Id.*, at 469.

In fact, such an interpretation of both P.L. 600 and the Constitution of Puerto Rico is inadmissible because it ignores more than 30 years of the history of the constitutional relationship between Puerto Rico and the United States. As the First Circuit, so experienced in these matters, recently held: "The [PRFRA] and the Puerto Rico Constitution were intended to work a significant change in the relation between Puerto Rico and the rest of the United States." *Córdova & Simonpietri, Ins.* v. *Chase Manhattan Bank,* 649 F. 2d 36, 39 (1st Cir. 1981). And this Court itself has held that "the purpose of Congress in the 1950 and 1952 legislation was to accord to Puerto Rico the degree of autonomy and independence normally associated with a State of the Union . . ." *Examining Board of Engineers, Architects and Surveyors* v. *Flores de Otero,* 426 U.S. 572, 594 (1976); *Calero-Toledo* v. *Pearson Yacht Leasing Co.,* 416 U.S. 663 (1974); *Rodríguez* v. *Popular Democratic Party,* 102 S. Ct. 2194, 2199 (1982) ("At the same time, Puerto Rico, like a State, is an autonomous political entity, 'sovereign over matters not ruled by the Constitution'.").[12]

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[12] Also very pertinent are the following assertions found in Lacovara, *supra* note 10:

> "[I]t was the express contemplation of the United States Government and the Puerto Rican people through their representatives at the time the Compact was proposed and accepted, that the autonomy being given to Puerto Rico was essentially local in nature and that the United States would have continued responsibility for international security and foreign-affairs matters affecting Puerto Rico." *Id.*, at 462.
>
> "[The] Compact provides for full autonomy, within a union with the United States and subject to continuing United States responsibility for Puerto Rico's 'foreign affairs' and military security." *Id.*, at 506.
>
> "Whatever was true of pre-Commonwealth status . . . , something legally and political (sic) significant happened to its status as a result of the 1950-1952 Compact." *Id.*, at 511.

One of those significant changes was precisely "partial freedom from Congressional control, since the local branches of government are not created nor its officials appointed by the federal government, and the laws of the local legislature are not subject to Presidential or Congressional veto." García-Passalacqua, *The Legality of the Associated Statehood of Puerto Rico,* 4 Inter Am. L. Rev. 287, 303-304 (1962), quoted approvingly in

Given these holdings, it may not be insisted that the strictures of "a republican form of government" should apply to Puerto Rico in a radically different fashion than to a State. But that is precisely what petitioner is urging this Court to do. Petitioner pretends that this Court put aside all pertinent precedents and hold that in Puerto Rico, unlike in a State, the meaning of the term republican form of government presents a justiciable controversy, that said term requires something more than a popularly elected government, and that any issue of separation of powers within the Commonwealth government is itself a federal question.

Such pretensions should be summarily rejected by this Court. Here, as was similarly held by the First Circuit in *Córdova & Simonpietri, supra,* there are no discernible reasons of any kind for treating Puerto Rico differently:

> "[G]iven a general Congressional intent to grant Puerto Rico state-like autonomy, we believe that there would have to be specific evidence or clear policy reasons embedded in a particular statute to demonstrate a statutory intent to intervene more extensively into the local affairs of post Constitutional Puerto Rico than into the local affairs of a state." 649 F. 2d at 42.

Lastly, the full breadth of petitioner's claim under P.L. 600 must be explored. Section 2 of P.L. 600 does not require only that the Commonwealth Constitution provide a republican form of government. It also requires a bill of rights. Thus, if petitioner's arguments were followed to their logical conclusion, this Court would have jurisdiction to review not only issues of separation of powers arising in disputes

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Lacovara, *supra*, at 512, who additionally termed the Compact and its changes irrevocable by unilateral action of the Congress. *Id.*, at 511, 513, 514.

Since 1977, when the law review article cited *supra* nn. 10-12 was written, there have been no changes in the Commonwealth status. Even some of the Commonwealth's attorneys in Washington have remained the same. See *id.* at 452 n.*. Only the administrations in control of the Executive Branch of the Commonwealth have changed.

among branches of the Commonwealth government; it could review also any claim by any person who alleged that his or her rights under the Commonwealth Constitution had been violated. The meaning of "sovereign over matters not ruled by the Constitution," *Rodríguez* v. *Popular Democratic Party*, 102 S. Ct. 2194, 2199 (1982), would then be nothing but a tasteless joke. Congress, in the words of Judge Magruder, would have perpetrated "a mounmental hoax" on Puerto Rico. *Figueroa* v. *People of Puerto Rico*, 232 F.2d 615, 620 (1st Cir. 1956).

C. The Judgment Below Is Based Upon Adequate and Independent Puerto Rican Constitutional Law Grounds and May Not Be Reviewed by this Court Under Settled Jurisdictional Principles.

Petitioner asserts that the Puerto Rico courts treated the Puerto Rico Constitution's legislative immunity clause, P.R. Const. Art. III, Sec. 14, as having the same meaning and effect as the Federal Constitution's Speech or Debate Clause, U.S. Const. Art. I, Sec. 6. (Pet. 3). He then claims that the trial court rested its judgment "principally on its interpretation of this Court's decisions" under the Federal Speech or Debate Clause (Pet. 7) and that the Puerto Rico Supreme Court, although it only cited Art. III, Sec. 14 of the Puerto Rico Constitution, likewise relied on federal precedents since it stated that the trial court " 'based its findings on an exhaustive analysis of the applicable Constitutional doctrines.' " (Pet. 8, citing App. 2a). From this, petitioner concludes that this Court has jurisdiction to review the judgment below and, under the standards of the Speech or Debate Clause, correct any misinterpretation of federal law and remand the case so that the Puerto Rico Supreme Court "may reconsider the state law question free of misapprehensions about the scope of federal law." (Pet. 3, quoting from *Three Affiliated Tribes of the Fort Berthold Reservation* v. *Wold Engineering, P.C.*, 104 S. Ct. 2267, 2277 (1984).

It is submitted that petitioner errs in his interpretation of the holdings of the Puerto Rico courts and of this Court's treatment of the doctrine of adequate and independent state grounds. The decision below rested solely on Puerto Rico constitutional law, in a situation where federal law is totally inapplicable, and may not be reviewed by this Court.

At all stages of this litigation it was crystal-clear to all parties that only the Puerto Rico legislative immunity clause was in issue. Respondents' motion to dismiss before the trial court was solely predicated on that basis. (Motion to Dismiss, pp. 2-3). Their brief reviewed federal cases under the Speech or Debate Clause, not because that clause was in any way involved in this litigation or compelled its result, but because of the light such cases might shed on the proper interpretation of the Puerto Rico legislative immunity clause. Petitioner also recognized this as a fact in his appearances both before the trial court (Motion for Reconsideration, pp. 3-4, 6)[13] as well as before the Supreme Court of Puerto Rico (Brief on Appeal, pp. 4, 5, 6, 13).

It is in this context that the references in the trial court opinion to federal cases must be understood. The trial court prefaced its discussion of these cases with the holding that herein petitioner could not prevail under "the Doctrine of Parliamentary Immunity contained in Section 14 of Article

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[13] On pages 3-4 of that Motion, petitioner quoted Art. III, Sec. 14 of the Commonwealth Constitution, quoted from *In re Rodríguez Torres*, 106 D.P.R. 698 (1978), which interpreted said clause, and went on to state:

> "It is due to its origins [the Puerto Rico legislative immunity clause] in Anglo-American common law, that we will refer to a line of cases which establish the judicial doctrine developed by the Supreme Court of the United States." (Our translation).

A similar statement was made on the Brief on Appeal before the Puerto Rico Supreme Court (p. 6). Thus, from the very outset petitioner himself recognized that it was proper to rely on federal cases under the Speech or Debate Clause for guidance and not because they compelled any result in the Puerto Rico constitutional context. See *Michigan* v. *Long*, 103 S.Ct. 3469, 3476 (1983).

No. 3 (sic) of the Constitution of the Commonwealth of Puerto Rico." (Pet. 3b). Its reasoning did not merely rely on federal cases. It also relied on three local cases[14] and on a French constitutional law text. (Pet. 3b, 4b, 7b, 9b). On appeal, the Supreme Court of Puerto Rico was even more precise. It held that "[i]n respect to the evidence that has not been made public, it is not proper that we intervene in an area of recognized parliamentary immunity. Article 3, Sec. 14, Constitution, Commonwealth of Puerto Rico." (Pet. 5a). That was the *only* authority cited by the Court in its opinion.

Petitioner, in a desperate attempt to assail this obviously adequate and independent state ground, urges this Court to interpret that the Puerto Rico Supreme Court's neutral description of the trial court opinion ("the appealed (sic) court based its findings on an exhaustive analysis of the applicable Constitutional doctrines") (Pet. 2a) constituted a reliance on federal law for the interpretation of state law and that its judgment, therefore, may be reviewed by this Court under *Michigan* v. *Long*, *supra* (hereafter "*Long*"). That strained interpretation of the judgment below would disregard the purposes of the *Long* doctrine.

Long is this Court's latest attempt to restate the adequate and independent state grounds jurisdictional doctrine. Its main thrust was thus stated by this Court:

> "Accordingly, when . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not

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[14] *In re Rodríguez Torres*, 106 D.P.R. 698 (1978); *Banco Popular, Liquidador* v. *Corte*, 63 D.P.R. 66, 63 P.R.R. 63 (1944); *Peña Clos* v. *Cartagena*, 83 JTS 83 (1983). The first case dealt with the local legislative immunity clause in the context of a disbarment proceeding against an attorney who was also a legislator; the other two, in the context of the scope of the legislative investigatory powers.

> clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Long, supra,* 103 S. Ct. at 3476.

Unlike in *Lona*, where the state court "referred twice to the state constitution in its opinion, but otherwise relied exclusively on federal law," 103 S. Ct. at 3474, the court below relied only on the Puerto Rico Constitution and made no reference at all to the Federal Constitution or to federal cases. Moreover, although the trial court did refer to federal cases, it clearly formulated its holding as based exclusively on the Puerto Rico Constitution (Pet. 3b, quoted *supra*). Also unlike *Long*, where the references to the Michigan Constitution were coupled with references to the Federal Constitution, 103 S. Ct. at 3474 n. 3, here there was no such coupling in the trial court opinion and no reference at all to the Federal Constitution in the opinion below. Thus, "the independence of the [Puerto Rico constitutional] ground is . . . apparent from the four corners of the opinion." *Long, supra,* 103 S. Ct. at 3475.

As this Court has recognized, *Three Affiliated Tribes* v. *Wold Engineering*, 104 S. Ct. 2267, 2276-2277 (1984) (hereafter "*Wold*"), there are two distinct instances where the adequate and independent state grounds doctrine does not preclude its review, in the context of a state court interpretation of state law which has been influenced by an accompanying interpretation of federal law. The first instance is when the state court construes a "state law narrowly to avoid a perceived conflict with federal statutory or constitutional requirements." *Wold, supra,* 104 S. Ct. at 2276. The second instance is when the state court construes the "state law broadly in the belief that federal law poses no barrier to the exercise of state authority." *Id.*, at 2277. None of these instances is here present.

The first instance is obviously inapplicable since the courts below admittedly construed the Puerto Rico legislative immunity clause broadly. The second instance is not applicable for a different reason. The fact is that the Puerto Rico Supreme Court did not *believe* that federal law posed no barrier to its interpretation of the scope of the local immunity clause; the Court *knew this for a fact*, and has known it for a long time.[15]

It is settled law that the Federal Speech or Debate Clause is not applicable to state legislators and that any immunity they may have, as pertains to a suit in state court, is grounded exclusively on local law. *Lake Country Estates* v. *Tahoe Planning Agency*, 440 U.S. 391, 404 (1979). The Puerto Rico Supreme Court has recognized this fact at least twice. In *In re Rodríguez Torres*, 106 D.P.R. 698 (1978), quoted by the trial court in this case, the Puerto Rico Supreme Court made a thorough exposition of the principles of legislative immunity created by the Puerto Rico Constitution. First, it explored the history and interpretation of the Federal Speech or Debate Clause. 108 D.P.R. at 705-709. Then it went on to explore the language, history and interpretation of the local clause, 108 D.P.R. at 716-720, not without first stating that its objective was to ascertain "whether our constitutional order requires a different treatment of the problem under discussion to that given in the United States." 108 D.P.R. at 712. After its analysis of the origins and development of the local clause, the Court concluded

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[15] Petitioner's reliance on *Wold* and on *Standard Oil Co.* v. *Johnson*, 316 U.S. 481 (1942) (Pet. 3), is thus misplaced. In both cases the state courts interpreted state law after engaging in a wrong interpretation of applicable federal law. This Court corrected their interpretation of federal law and remanded the cases to permit the state courts to interpret the state law "free of misapprehensions about the scope of federal law." *Wold*, *supra*, 104 S. Ct. at 2277. In the case at hand the courts below were surely right in their belief that no federal law is applicable to a claim of local legislative immunity in a suit brought by the local executive branch. See *infra*.

that the 1951 Constitutional Convention rejected all efforts to shrink the local legislative immunity, but instead reinforced it, 108 D.P.R. at 717; that our local clause "descends from the parliamentary immunity clauses of the Anglo-Saxon tradition," 108 D.P.R. at 718; that the Constitutional Convention retained and even strengthened, the privilege, 108 D.P.R. at 719; and that "our constitutional order preserved a broad field for the privilege of parliamentary immunity, *at least* as broad as it is recognized in United States case law." 108 D.P.R. at 721 (emphasis ours).

The second pertinent case is *Romero Barceló, Governor* v. *Hernández Agosto, Senate President*, 84 J.T.S. 35 (1984), decided just three weeks before the judgment below. The Court held that the local legislative immunity required the dismissal of a suit brought by the Governor to enjoin the televised broadcast of the Cerro Maravilla hearings. In so holding, the Court once again made a broad construction of the local clause and held that it comprised activities where the legislators "scrutinize the government, debate issues of general interest and inform the country on the course of public affairs." *Id.*, at 3569. It specifically recognized that legislation is not the sole or even the principal function of a Legislature. Of equal importance and rank, it held, are the following functions: investigation, oversight, discussion and information. *Id.* This holding undoubtedly goes a great deal beyond anything this Court has held under the Speech or Debate Clause. Compare to *Doe* v. *McMillan*, 412 U.S. 306 (1973); *Hutchinson* v. *Proxmire*, 443 U.S. 111 (1979); *Gravel* v. *United States*, 408 U.S. 606 (1972).[16]

In light of these holdings it is simply impossible to conclude that the Puerto Rico Supreme Court felt compelled by

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[16] The Court expressly recognized that the Speech or Debate Clause of the United States Constitution does not apply to the States nor to Puerto Rico. It cited *Lake Country Estates* v. *Tahoe Regional Planning Agency*, 440 U.S. 391, 404 (1979), for that proposition. 84 J.T.S. 35 at 3571.

federal law to rule as it did in this case, when just three weeks earlier it had made an expansive interpretation of the local clause and had specifically stated that its interpretation was not dependent on its federal counterpart.

We submit that the lone citation of the local constitutional clause in the opinion below is a "plain statement" of a "bona fide separate, adequate, and independent ground," *Long, supra*, 103 S. Ct. at 3476, which prevents this Court from exercising appellate jurisdiction in this case. *Long's* objective of reducing federal-state conflicts as well as delay in judicial administration, 103 S. Ct. at 3475, would not be well served if state courts were required to make their "plain statement" in a particular, ritualistic language. If this Court were to hear this case, it would render an unnecessary advisory opinion, also contrary to *Long's* purposes, 103 S. Ct. at 3476, only to see the judgment reinstated by the court below on local grounds. Only a perversion of the *Long* holding would sustain such a course of action. See generally, Comment, *Michigan* v. *Long: Presumptive Federal Appellate Jurisdiction over State Cases Containing Ambiguous Grounds of Decision*, 69 Iowa L. Rev. 1081 (1984).[17]

For all these reasons it is submitted that this Court lacks jurisdiction over the petition for certiorari and should dismiss it.

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[17] The trial court's exposition of federal cases, which was not specifically endorsed by the Puerto Rico Supreme Court, cannot be the subject of review in this Court. If this Court were to correct any misinterpretation of federal law found in a state court opinion, when the state court used federal law merely for guidance, it would incessantly issue advisory opinions on a host of difficult, complex problems. This Court expressly rejected such a course of action in *Long*. See 103 S. Ct. at 3476.

II. THE PETITION DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION WHICH THIS COURT SHOULD HEAR

Since respondents are convinced of this Court's lack of jurisdiction over the petition for certiorari, they will address the merits briefly, but will go directly to the heart of this case.

Even if this Court were to hold, somehow, that there is a timely, properly presented and justiciable federal question before it, and not solely issues of Puerto Rican law, the petition still would not merit this Court's attention. Petitioner's arguments against the application to this case of the concept of absolute legislative immunity under the Speech or Debate Clause might, *arguendo*, make more sense in another case. They are certainly out of place in this one.

This is not an ordinary case where the Executive Branch needs access to "every man's evidence", *United States v. Nixon*, 418 U.S. 683, 710 (1974), to prosecute a violation of the criminal law. (Pet. 13). That premise conveniently forgets the real facts of this case, as previously described, and with which the courts below were undoubtedly familiar.

Unlike *Nixon*, here we do not face a clash between a particularized claim for access to evidence of criminal wrongdoing, in the one hand, and a generalized claim of constitutional privilege, in the other. (*Id.*). Instead, we have a generalized, all-comprehensive demand by the Executive Branch for any and all evidence which a legislative committee may have gathered and not made public yet, obtained in a legitimate, long-awaited, major investigation of criminal wrongdoing by some of the highest officers in the Executive Branch itself. Facing this generalized demand is a legislative claim of immunity from having to reveal to citizens not above suspicion the evidence and leads the committee may have gathered, before the investigators have finished their evaluation of such evidence and have pursued such leads to wherever these may take them.

Petitioner's federal analogy is not apt. This case is not at all similar to *United States* v. *Nixon, supra*. It would resemble much more a case which, fortunately for the Federal government, never did occur. Its caption would have been *Nixon* v. *Senate Select Committee on Watergate and House Judiciary Committee*. Indeed, the real issue in the present case is whether the Governor of Puerto Rico can take the Senate of Puerto Rico to court and force it to reveal to him whatever evidence it may have gathered against him, before its investigation is complete.

That is what makes this case unique, and uniquely inappropriate for this Court's consideration.

This Court should not go out of its way to decide whether, in a hypothetical clash between the President and Congress, an exception to absolute legislative immunity should be recognized.[18] That highly important issue of federal constitutional law should await its day. The President and Congress are not now before this Court, nor is any issue involving them. Such an important issue of federal constitutional law should not be decided in a case where only members of Puerto Rico's legislative and executive branches are parties, where the issue was not timely or properly presented to the lower courts, and where the adequate and independent state grounds doctrine would most probably deprive the judgment of this Court of any concrete effect.

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[18] Petitioner's protestations notwithstanding, this Court has squarely ruled that there is indeed absolute congressional immunity from suit when Congressmen or their aides are sued as a result of legitimate legislative activities such as legislative investigations. *Eastland* v. *United States Servicemen's Fund* 421 U.S. 491, 504-05 (1976). See also *Tenney* v. *Brandhove*, 34[illegible].S. 367, 377-78 (1951). In the case at bar, petitioner very early and expressly refused to question the legitimacy of the Senate investigation. Motion for Reconsideration, Superior Court of Puerto Rico, pp. 6-7. Thus, even if federal law ruled this case, which is does not, *Eastland* and *Tenney* would preclude this suit against these respondents.

CONCLUSION

The petition for certiorari should be dismissed for lack of jurisdiction or, in the alternative, denied in the exercise of this Court's discretionary jurisdiction.

Respectfully submitted.

In San Juan, Puerto Rico, this 12th day of October, 1984.

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No. 84-373

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JUAN CORCHADO JUARBE, Director,
Bureau of Special Investigations of the
Puerto Rico Department of Justice,
Petitioner,

v.

FRANCISCO APONTE PEREZ, Chairman, Judiciary
Committee of the Puerto Rico Senate, *et al.,*
Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Puerto Rico

REPLY BRIEF IN SUPPORT OF PETITION

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IN THE

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No. 84-373

JUAN CORCHADO JUARBE, Director,
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FRANCISCO APONTE PEREZ, Chairman, Judiciary
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REPLY BRIEF IN SUPPORT OF PETITION

In their statement, respondents offer a distorted picture of the history of the Cerro Maravilla investigation (Opp. 2-4). Their description of the Senate's work echoes the partisan manner in which the investigation itself has proceeded. The Governor and his senior department heads have provided the Senate investigation with thousands upon thousands of pages of documents, responding in full to numerous demands for material. The Governor and his aides have balked at responding only to those election-year requests that swept so broadly as to require burdensome searches for irrelevant material and for material that is at the core of executive privilege.

ARGUMENT

I. THE CASE INVOLVES A SUBSTANTIAL ISSUE OF FEDERAL LAW.

Respondents attempt to read federal law out of this case by asserting three propositions: (1) The "republican form of government" requirement in Public Law 600 is not justiciable; (2) Public Law 600 does not mandate a government of separation of powers; and (3) Puerto Rico is not like a territory at all, but has the same autonomy and status as a State does in allocating powers within its government. All three are incorrect.

1. The requirement in Public Law 600 that Puerto Rico organize and maintain a government in the "republican form" is justiciable. This Court has not totally foreclosed even judicial interpretation of the Guaranty Clause of the United States Constitution itself. *See, e.g., Minor v. Happersett,* 88 U.S. (21 Wall.) 162 (1875); *Duncan v. McCall,* 139 U.S. 449 (1891); *Forsyth v. Hammond,* 166 U.S. 506 (1897); *Baker v. Carr,* 369 U.S. 186 (1962); *Rodriguez v. Popular Democratic Party,* 457 U.S. 1, 9 n.8 (1982) (all addressing various components of the required form of government). In any event, this Court's concern with the justiciability of the constitutional guarantee "is primarily a function of the separation of powers." *Baker v. Carr, supra,* 369 U.S. at 210. By contrast, this case concerns merely the interpretation of a federal statute, a task clearly and unequivocally belonging to the federal judiciary. The issue in this case is: What limits did Congress intend to impose on the powers to be exercised by basic components of the Puerto Rico government when it insisted in Public Law 600 that Puerto Rico adopt and maintain a "republican form of government"? Even if the answer is "none," as respondents argue, this is a justiciable question.

2. The term "republican form of government" as used in 1950 in Public Law 600 does not have the limited meaning suggested by respondents.

The historical materials demonstrate that even in 1787, the Framers understood the term to require a government bound by the principles of "separation of powers" and "checks and balances." The Federalist Papers repeatedly speak of the separation of powers as the bulwark of republican government. Federalist No. 9, for instance, speaks of various principles unknown in ancient republics, the absence of which led to their failure. Those missing principles included the "regular distribution of power into distinct departments; the introduction of legislative balances and checks . . . ." *The Federalist,* No. 9 at 72 (New Amer. Lib. Ed. 1961). *See also id.,* No. 47 at 301; No. 51, at 321; and No. 66, at 401. Nor is this link between the "republican form of government" and the separation of powers in *The Federalist* an accident. As explained in a recent scholarly work, D. Epstein, *The Political Theory of The Federalist* (1984) (Chap. 5), this link between a proper "republican" government and the separation of the branches into limited, co-equal "departments" was crucial to the prevailing political philosophy of the Founders.

The ultimate issue here, however, is not what the Framers meant when they wrote the Guaranty Clause into the Constitution in 1787, but rather what Congress and the President meant when they authorized and ratified the Puerto Rico Constitution in the Compact of 1950-1952. By the middle of this century, the United States government and the government of every State reflected an unwaivering commitment to that system. In the absence of evidence to the contrary—which respondents concede does not exist—"words will be interpreted as taking their ordinary, *contemporary,* common meaning." *Perrin v. United States,* 444 U.S. 37, 42 (1979) (emphasis added).

Moreover, an examination of the record of the approval of the Puerto Rico Constitution in 1952 by Congress and the President demonstrates that they actually understood that the concepts of a republican government and the separation of powers, as established in a government of three co-equal branches with distinct responsibilities, went hand-in-hand. *See* Pet. at 15 n.3; *see also* S. Rep. 1720, 82d Cong., 2d Sess. 2, 4, 5, 7, 8 (1952). For example, Rep. Murdoch explained why the people of Puerto Rico had complied with the obligation to create a republican form of government: "Based on the democratic principle that ultimate authority rests with the people, they have created a representative government with the three classical independent branches of the government—executive, legislative and judicial." 98 Cong. Rec. 6166 (1952). He also quoted a constitutional law expert in describing the proposed Puerto Rico Constitution: " 'It creates three independent departments of equal category, *as it should.* Each one of the three powers would act as a check and balance on the other'." *Id.* (emphasis added). Other congressmen made similar observations. *See, e.g.,* 98 Cong. Rec. 6168 (remarks of Rep. Miller); 6169 (remarks of Rep. Bentsen); 7837 (remarks of Sen. Malone); 7839, 7848 (remarks of Sen. Lehman); 7843, 7846 (remarks of Sen. Chavez); 7845 (remarks of Sen. O'Mahoney).

Respondents dismiss as "inapposite" to the recognition of congressional intent the decisions in *Springer v. Government of the Philippine Islands,* 277 U.S. 189 (1928), and *Camacho v. Civil Service Commission,* 666 F.2d 1257 (9th Cir. 1982) (Opp. 15). Respondents reject *Springer* because the statute at issue there was the congressionally adopted Organic Act for the Commonwealth of the Philippine Islands, which expressly divided that government's powers into three separate branches (Opp. 15-16). That statute, however, reflected Congress' under-

standing of what form of autonomous government should be permitted in American territories or commonwealths. This Court explained in *Springer* that the Organic Act, "following the rule established by the American constitutions, both state and federal, divides the government into three separate departments—the legislative, executive and judicial" and that "as a general rule inherent in the American constitutional system," this division makes each branch independent of the others and coequal with them. 277 U.S. at 201. When authorized to organize a government for themselves, but only on the condition that it reflect the "republican form of government," the people of Puerto Rico understood what structure this involves, and they formed—and Congress and the President appropriately approved—precisely this type of tripartite government. The decision in *Springer* pointed out the inherent restriction on a territorial legislature's attempt to expand its powers at the expense of the executive branch's responsibilities.

The respondents say that *Camacho,* which involves the recently chartered Commonwealth of the Northern Mariana Islands, supports their position because Congress stipulated that the people of that territory had to adopt a constitution that would "provide for a republican form of government *with separate executive, legislative and judicial branches* . . . ." 48 U.S.C. § 1681 note (emphasis added). Respondents seize on the inclusion of the underscored language as implying that the "republican form" requirement of Public Law 600, which did not include that specificity, must have meant that the people of Puerto Rico were not obliged to adopt this tripartite form of government separated into coequal branches (Opp. 16-17). The language of the Northern Mariana charter, however, shows that the underscored language is merely a matter of clarification and definition, not an additional or otherwise optional element. Instead, as the

language makes clear, Congress was defining for the people of those Pacific Islands what everyone familiar with "the American constitutional system" (*Springer, supra,* 277 U.S. at 201) understands to be the essential ingredient of the republican form of government. Neither Congress nor the people of Puerto Rico in 1950-1952 had any doubt about this proposition, because the Puerto Rico Constitution appropriately—and necessarily—conformed to this structure.

Thus, the respondents miss the point in contending that the petitioner in this case is somehow challenging the 1952 congressional and presidential approval of that constitution as satisfying the "republican form of government" requirement (Opp. 14-15). The issue raised in this case is whether the legislature's current assertion of immunity vis-a-vis the Executive Branch *exceeds* the authority permitted by Public Law 600 under this system.

3. Respondent's political argument that Puerto Rico has the autonomy of a State in deciding how to allocate government powers and immunities (Opp. 19-21) ignores the reality behind Public Law 600. There is ample evidence in the legislative history of Public Law 600 that, although Congress intended to allow Puerto Rico a great deal of latitude in its internal affairs, Congress explicitly declined to grant Puerto Rico *all* the power and autonomy that a State would enjoy, unless and until the people of Puerto Rico applied for statehood and Congress extended it. Congress intended to retain ultimate federal authority over Puerto Rico.

Much of the testimony of the leading proponents of the Compact demonstrates that federal law continues to govern this issue. As Puerto Rico's Resident Commissioner in Congress, Fernos-Isern, who sponsored the proposed Compact, stated in the congressional hearings on the bill:

> ". . . the road to the courts would always be open to anybody who found that an amendment to the

> constitution went beyond the framework laid down by Congress; and, secondly, the authority of the Government of the United States, of this Congress, to legislate in case of need would always be there." *Hearings before the Committee on Public Lands on H.R. 7674 and S. 3336,* 81st Cong., 2d Sess. 33 (1950).

Governor Munoz Marin offered similar analysis. *Id. See also* H.R. Rep. 2275, 81st Cong., 2d Sess., *reprinted in* [1950] U.S. Code Cong. & Ad. News 2681, 2682. Over on the Senate side, a similar intent to limit Puerto Rico's autonomy under the Compact was expressed. *See Hearings Before the Senate Committee on Interior and Insular Affairs on S.J. Res. 151,* 82d Cong., 2d Sess. 43-45 (1952) (testimony of Mr. Silverman, Chief Counsel of the Office of Territories). Moreover, to leave no doubt about the matter, Congress conditioned its 1952 approval of the proposed Puerto Rico Constitution on inclusion of a new section, which was then added, expressly recognizing that any future amendment to the Constitution would have to be "consistent with," *inter alia,* Public Law 600. P.L. 447, 82d Cong., *reprinted in* [1952] U.S. Code Cong. & Ad. News 321.

Although the respondents quote snippets from some cases indicating that for *some* purposes Puerto Rico is to be treated like a State of the Union, the case law also offers many examples of instances where Puerto Rico is considered not essentially a State but rather a territory. In *Harris v. Rosario,* 446 U.S. 651 (1980), this Court itself recently treated Puerto Rico's current status as that of a territory subject to plenary congressional power under Article IV of the Constitution:

> "Congress, which is empowered under the Territory Clause of the Constitution, U.S Const., Art. IV, § 3, cl 2, to 'make all needful Rules and

> Regulations respecting the Territory . . . belonging to the United States,' may treat Puerto Rico differently from States so long as there is a rational basis for its actions." 446 U.S. at 651-52.

Thus, Public Law 600 manifests Congress' continuing plan for the government of Puerto Rico, and in the words of Rep. Fernos-Isern in 1952, "the road to the courts would always be open to anybody" who shows that the Puerto Rico government is going "beyond the framework laid down by Congress. . . ."

4. Respondents make little attempt to justify their actions, or the decision below, on the merits. In the body of their brief, they ignore the issue of legislative immunity from suit. Respondents devote one sentence in a footnote to the complicated issue of legislative immunity, and simply assert that because the Senate's investigation was "legitimate," the petitioner could not press his subpoenas (Opp. 29 n.18). Instead, respondents make gratuitous and conclusory comments about why this case differs from *United States v. Nixon,* 418 U.S. 683 (1974). Those comments fail to respond to petitioner's careful analysis of the factors and interests to be weighed, which were ignored by the courts below (Pet. 13-14).

II. THE FEDERAL ISSUE IS ADEQUATELY PRESENTED.

1. Respondents make much of the fact that the petitioner did not specifically discuss the impact of the 1950-1952 Compact until he filed a concededly timely motion for reconsideration in the Puerto Rico Supreme Court (Opp. 8-10). In doing so, however, they ignore the central thrust of petitioner's argument: that clashes between the branches of the Puerto Rico government over their respective powers vis-a-vis one another are at bottom issues of federal law, because the congressional plan embodied in Public Law 600 governs their outcome. The

issues in this case, therefore, inherently arose under federal law and required consideration of federal law to resolve them. Therefore, the discussion in the motion for reconsideration is legally irrelevant to determining this Court's jurisdiction. Because the petitioner's claim of right in the lower court was a right "under" the laws of the United States, this Court has jurisdiction under 28 U.S.C. § 1258(3) to review the judgment sustaining the respondents' immunity from producing evidence in an investigation at the core of the Executive Branch's obligation to enforce the law.

2. Finally, respondents attack this Court's jurisdiction on the ground that the lower court's single, unelaborated citation to Article III, Section 14 of the Puerto Rico Constitution establishes that the lower court relied solely on local law rather than on federal law under the Speech or Debate Clause in reaching its decision (Opp. 21-27). That argument requires this Court to ignore the Puerto Rico Supreme Court's reliance on the Superior Court's "exhaustive analysis of the applicable Constitutional doctrines." (Pet. App. 2a.) The Superior Court, in turn, had looked to this Court's decisions in cases under the Speech or Debate Clause in reaching its conclusion (Pet. App. 3b-7b). The court's view that federal precedents and standards are intertwined with the proper interpretation of Puerto Rico legislative immunity was understandable because, as respondents recognize (Opp. 26), the local clause "descends from the parliamentary immunity clauses of the Anglo-American tradition."

Under these circumstances, this Court's decision in *Michigan v. Long*, ___ U.S. ___, 77 L.Ed.2d 1201 (1983) is right on point: because "the adequacy and independence of any possible state law ground is not clear from the face of this opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." 77 L.Ed.2d at 1214. Despite

respondent's contention to the contrary (Opp. 27 n.17), the Puerto Rico Supreme Court did "endorse" the Superior Court's "exposition of federal cases." The single citation to Article III, Section 14 does not dispel the ambiguity nor eliminate this Court's authority to clarify the misconstruction of federal principles upon which the Puerto Rico courts appear to have relied in reaching their decisions, not "merely for guidance" (Opp. 27 n.17) but as justifying their broad interpretation of the respondents' immunity from suit. Under these circumstances, this Court has held that it will "merely assume that there is [no adequate and independent state grounds] when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law." 77 L.Ed.2d at 1215. For this additional reason, therefore, this Court has jurisdiction under 28 U.S.C. § 1258(3) to review the decision below.

CONCLUSION

Certiorari should be granted.

Respectfully submitted.

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